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Supreme Court, U.S.
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No. ________

In The

Supreme Court of the United States

October Term, 1997

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IN RE: FOB JAMES, JR., GOVERNOR OF ALABAMA;
SCHOOL BOARD OF DEKALB COUNTY, ALABAMA,

Petitioners.

◆

**On Petition For A Writ Of Mandamus
To The United States District Court For The
Middle District Of Alabama**

◆

PETITION FOR A WRIT OF MANDAMUS

◆

ROBERT B. FRENCH
Attorney for DeKalb County School Board
P.O. Box 680596
Ft. Payne, AL 35967
(205) 845-2250

FORREST H. JAMES III
Attorney of Record for Governor Fob James, Jr.
300 Vestavia Parkway,
Suite 2300
Birmingham, AL 35216
(205) 823-8751

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. IS IT THE "PEOPLE OF THE UNITED STATES," OR THE JUSTICES OF THIS COURT, WHO HAVE CONSTITUTIONAL AUTHORITY TO DECIDE THE "FUNDAMENTAL PRINCIPLES OF OUR SOCIETY?"
2. SHOULD NOT THE MEMBERS OF THIS COURT, CONSISTENT WITH THEIR OATHS OF OFFICE TO THE CONSTITUTION, UPHOLD THE PEOPLES' "FUNDAMENTAL PRINCIPLE" DIFFUSING AUTHORITY TO DECIDE CHURCH-STATE ISSUES AMONG THE MANY JURISDICTIONS OF THE STATES RATHER THAN CENTRALIZING THAT AUTHORITY IN A FEDERAL JURISDICTION?
3. HAVE THE "PEOPLE OF THE UNITED STATES", THROUGH THEIR MORAL FAILINGS OR OTHERWISE, FORFEITED THEIR RIGHT TO DECIDE THE "FUNDAMENTAL PRINCIPLES" OF GOVERNMENT INTO THE HANDS OF THIS SELF-AVOWED "DISINTERESTED AND DETACHED" COURT?

LIST OF PARTIES

The parties to the proceeding in the District Court for the Middle District of Alabama and in the United States Court of Appeals for the Eleventh Circuit are as follows:

Plaintiffs-Appellees

Jesse Chandler (by and through his father and next friend, Michael Chandler)

Michael Chandler

Defendants-Appellants

Alabama State Board of Education

Dr. Stephanie Bell (Member, Alabama State Board of Education)

Dot D. Burke (Member, DeKalb County Board of Education)

Greg Buttram (Member DeKalb County Board of Education)

David Byers (Member, Alabama State Board of Education)

Bradley Byrne (Member, Alabama State Board of Education)

Mary Jane Caylor (Member, Alabama State Board of Education)

Honorable Ira DeMent (United States District Judge)

Dr. Ethel Hall (Member, Alabama State Board of Education)

LIST OF PARTIES – Continued

G. J. "Dutch" Higginbotham (Member, Alabama State Board of Education)

Willard A. Israel (former Member, DeKalb County Board of Education)

Forrest H. "Fob" James, Jr. (Governor, State of Alabama)

Tommie Johnson (Member, DeKalb County Board of Education)

Richard R. Land (Superintendent, DeKalb County Board of Education)

Office of the Attorney General, State of Alabama

Weldon Parrish (former Superintendent, DeKalb County Board of Education)

William H. Pryor (Attorney General, State of Alabama)

Sandra Ray (Member, Alabama State Board of Education)

Dr. Ed Richardson (Superintendent, Alabama State Board of Education)

Jimmy Wilbanks (Member, DeKalb County Board of Education)

Michael R. White, Office of General Counsel of the State Board of Education (Counsel for State Board of Education and its individual Members)

Johnny Young (Member, DeKalb County Board of Education)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS TO GRANT THE WRIT 4

I. Only The "People Of The United States," Not The Justices Of This Court, Have Constitutional Authority To Decide The "Fundamental Principles Of Our Society." 4

II. The Members Of This Court, Consistent With Their Oaths Of Office To The Constitution, Should Uphold The Peoples' "Fundamental Principle" Diffusing Authority To Decide Church-State Issues Among The Many Jurisdictions Of The States Rather Than Centralizing That Authority In A Federal Jurisdiction 11

III. The "People Of The United States" Have Not, Through Their Moral Failings Or Otherwise, Forfeited Their Right To Decide The "Fundamental Principles" Of Government Into The Hands Of This Self-Avowed "Disinterested And Detached" Court........................... 15

TABLE OF CONTENTS – Continued

Page

IV. The Conditions for granting the Writ prescribed by Supreme Court Rule 20 has been met...... 28

A. There are exceptional circumstances present 28

B. Relief cannot be had by any other court... 29

C. The Writ will be in aid of this Court's appellate jurisdiction........................... 29

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Abington School District v. Schempp, 374 U.S. 203 (1963) 24

Adkins v. Children's Hospital of the District of Columbia, 261 U.S. 525 (1923) 22

America Booksellers Assoc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985) 22

Bartkus v. People of the State of Illinois, 359 U.S. 121 (1959) 5, 12

Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) 10

City of Boerne v. Flores, 117 S. Ct. 2157 (1997) 7

Dred Scott v. Sanford, 60 U.S. 393 (1856) 22

Engel v. Vitale, 370 U.S. 421 (1962) 21, 24

Marbury v. Madison, 5 U.S. 137 (1803) .... *passim*

Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925) 22

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) 6, 7, 15, 16

Roe v. Wade, 410 U.S. 113 (1973) 6, 16, 22

Stone v. Graham, 449 U.S. 39 (1980) 23

Wisconsin v. Yoder, 406 U.S. 205 (1972) 22

STATUTES

28 U.S.C. § 1651(a) 1, 2

Alabama Code § 16-1-20.3 .... 1, 2, 3

TABLE OF AUTHORITIES – Continued

Page

Other Authorities

Abraham Lincoln; Complete Works 5 (J. Nicolay & J. Hay eds. 1920) 20

Abraham Lincoln; *Proclamation of a Day of Fasting,* Aug. 12, 1861 25

Beware the Agenda of Alabama Theocrats Who Would Establish a State Religion, INSIGHT ON THE NEWS, Jan. 5, 1998 16

Brennan, William, Address at Park School (Nov. 21, 1982), at pp. 18-19 .... 6, 18

Congressional Record 13, 14, 15

Forrester, W. *"Are We Ready For Truth In Judging?"* 63 A.B.A.J. 1212 (1977) 6

Kaufman, B. A., Washington's Farewell Address: The View from the 20th Century (Chicago/ Quadrangle Books) 7

Papers of George Washington, Presidential Series 284-86 (W.W. Abbot et al., eds) (Mark A. Mastromarino, ed.), University Press of Virginia (Charlottesville, 1996) 26

Stokes, Anson Phelps, Church And State In The United States, 51, 418, 427-46 (1950) 21

The Real Thomas Jefferson 498 (1983) (National Center for Constitutional Studies) 19

Constitutional Provisions

U.S. Const. art. I 2, 18

	Page
U.S. CONST. art. V	2, 18
U.S. CONST. art. VI	2, 18, 21, 30
U.S. CONST. amend. I	2, 11, 12, 15
U.S. CONST. amend. XIV, Sec. 1	2, 12
U.S. CONST. preamble	10
ALA. CONST. (1901), Art. I, Sec. 1	21
ALA. CONST. (1901), Art. I, Sec. 3	21

PETITION FOR A WRIT OF MANDAMUS

Petitioners Fob James, Jr., Governor of Alabama, and the Dekalb County, Alabama, Board of Education and its current members: Tommie Johnson, Mary Etta Bailey, Johnny Young, Greg Buttram, Dot Burke, and Richard Land, pursuant to Rule 20 of the Rules of this Court and 28 U.S.C. § 1651(a) ("All Writs Act"), request that this Petition for a Writ of Mandamus be granted and that such writ be issued directing the United States District Court for the Middle District of Alabama to dismiss the action styled *Chandler v. James,* Civil Action No. 96-D-169-N and vacate any orders issued therein, for lack of subject matter jurisdiction.

OPINIONS BELOW

The Order of the United States District Court for the Middle District of Alabama dated July 30, 1997, denying Petitioner James' motion to dismiss for lack of subject matter jurisdiction is unreported, but is reproduced in the Appendix, at App. 1-3. The district court's original Memorandum Opinion, issued March 12, 1997, declaring Ala. Code § 16-1-20.3 to be unconstitutional is reported as *Michael Chandler, et al., v. Forrest H. "Fob" James, Jr., et al.,* 958 F. Supp. 1550 (M.D. Ala. 1997) and is reproduced in the Appendix, at App. 177-219. Under the same case style, the District Court entered additional Orders on October 29, 1997, permanently enjoining the Defendants from certain actions, which is reported at 985 F. Supp. 1062 (M.D. Ala. 1997) and reproduced in the Appendix, at App. 257-272; on November 12, 1997, vacating portions of its October 31, 1997 Order and granting Plaintiff Chandler's motion for partial summary judgment, which is reported at 985 F. Supp. 1094 (M.D. Ala. 1997) and reproduced in the Appendix, at App. 152-176; on November 12, 1997, supplementing its earlier Opinion and Orders, which is reported at 985 F. Supp. 1086 (M.D. Ala. 1997) and reproduced in the Appendix, at App. 89-151; and on December 17, 1997, modifying its permanent injunction, which is reported at 1997 WL 843711 (M.D. Ala. Dec. 17, 1997) and reproduced in the Appendix, at App. 4-88.

JURISDICTION

Petitioners seek relief from the District Court's Order of July 30, 1997, App. 1-3, denying Petitioner James's motion to dismiss this action for lack of federal subject matter jurisdiction, and thus relief from the other Orders of the Court as well. This Court has jurisdiction to issue a writ of mandamus to the District Court pursuant to Rule 20 of the Rules of this Court and 28 U.S.C. § 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved, U.S. Const. Arts. I, V, VI, Amendments I, XIV, are fully set in the Appendix, at App. 220-222.

The only statutory provision at issue is Alabama Code § 16-1-20.3 which provides, in relevant part, that,

> On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.
>
> Ala. Code § 16-1-20.3(b) (1995).

STATEMENT OF THE CASE

Plaintiffs, a school principal and his son, filed a complaint in the United States District Court on February 2, 1996. Plaintiffs challenged the constitutionality of a school prayer statute, codified at § 16-1-20.3 of the *Code of Alabama,* which purported to authorize "non-sectarian, non-proselytizing student-initiated voluntary prayer." Plaintiffs also sought an injunction against any prayer to God by teachers and students together in the public schools, or by coaches and athletes together at school events, or by students either alone or together as part of an official school event, in Dekalb County, Alabama. On March 12, 1997, the District Court issued a non-final Opinion and Order finding the statute and the above-described prayer "unconstitutional."

On July 22, 1997, after becoming aware of the issues involved in this case, Petitioner Governor Fob James, Jr. filed a motion to dismiss for lack of federal subject matter jurisdiction and a supporting affidavit. The district court denied the motion on July 30, 1997. App. 1-3.

From October 29, 1997, through December 17, 1997, in a final Order and several supplementary Orders, the District Court issued a permanent injunction against various state and local school officials, including Petitioners, "and all those in active concert with them," enforcing the findings of its previous Memorandum Opinion. In response to Petitioner James' specific request that the prayers to God of American citizens according to their own consciences be freely allowed in the schools, especially during national emergencies such as war, the Court ruled specifically that "crisis" prayer would not be allowed. App. 165. The Court noted specifically that it would use its power of "contempt", which Petitioners understand to be its power to impose fines or imprisonment, to enforce its injunction. App. 272. The Court also ordered the appointment of a "monitor" to seek out and report "illegal" prayer in the Dekalb County schools, as well as to instruct school officials on what would be required of them under the orders of the Court. App. 270-272. The District Court retained jurisdiction of the case to enforce its Orders. App. 272.

On November 17, 1997, Petitioner James filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit. The Petitioner School Board and its members followed with a Notice of Appeal. The case has been docketed and awaits final briefing or argument in the Court of Appeals. The activities of the "monitor" and implementation of the injunction are ongoing.

REASONS FOR GRANTING THE WRIT

I. Only The "People Of The United States," Not The Justices Of This Court, Have Constitutional Authority To Decide The "Fundamental Principles Of Our Society."

"The whole American fabric," wrote Chief Justice Marshall, "has been erected" on the authority of "the people . . . to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness. . . . " *Marbury v. Madison,* 5 U.S. 137, 176 (1803). "The principles, therefore, so established, are deemed fundamental," he wrote. *Id.* These fundamental principles established by the people "are designed to be permanent," because "the authority, from which they proceed [the people themselves] is supreme, and can seldom act. . . . " *Id.* For the unanimous Court in *Marbury,* Chief Justice Marshall said, "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation. . . . " *Id.* at 177.

By 1959, however, this Court had unraveled "the whole American fabric" of government by ruling that the Justices of this Court, rather than the people of this country have the authority to decide the "fundamental principles of our society":

> Decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of our society. The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment. *Bartkus v. People of the State of Illinois,* 359 U.S. 121, 128 (1959).

No longer was the supreme authority in the "American system of law" defined by the written Constitution established by the people, but now by this Court's self-proclaimed ability for "disinterestedness and detachment," and by what this Court, from its own perception of "conscience," would determine to be the "fundamental principles of our society."

In a speech in the city of Boston in 1982, Justice Brennan of this Court expressed the same thought when he said:

> . . . the judiciary is 'the essentially disinterested, rational and deliberate element of our society. . . . ;' and
>
> Obviously we Americans must accept that . . . 'upon judges, and particularly Justices of the Supreme Court, rests a great share of the delicate responsibility of deciding what must be

> preserved and what must be changed, what we shall protect and what we shall abandon.'[1]

And, it was Justice William Douglas of this Court who explained how this process of "change" in the nation's fundamental law has worked: "Due process, to use the vernacular, is the wildcard that can be put to such use as the Judges choose," he told the American Bar Association Journal.[2]

More recently, Justice O'Connor, with the agreement of four other members of this Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844, 922 (1992), responded to criticism of the Court's decision in 1973 to supplement the Constitution by creating a federal right to an abortion. That decision, *Roe v. Wade*, 410 U.S. 113 (1973), in one day laid the groundwork for a widespread abortion "industry" which, through the present, has destroyed some 30 million fetuses. Nevertheless Justice O'Connor and her allies in *Casey* reasoned that this Court's inherent power to declare what was "fundamental" was broad enough to reach issues involving "one's own concept of existence, of meaning, of the universe, and of the mystery of human life." 505 U.S. at 851.

The federal right to an abortion rests, therefore, on this Court's claim of power to decide the meaning "of the universe," a broad power indeed. By the hands of this Court, abortion has become a way of life in all of America.

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[1] Justice William Brennan, Address at Park School (Nov. 21, 1982), at pp. 18-19.

[2] W. Forrester, *"Are We Ready For Truth In Judging?"* 63 A.B.A.J. 1212 (1977).

Moreover, since *Casey* this Court has made it clear that only this Court, and not any *inferior* branch of government such as Congress, has the power to change the fundamental law:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means'. . . . *Marbury v. Madison,* I Cranch, at 177, 2 L. Ed. 60. Under this approach, it is difficult to conceive of a principle that would limit congressional power.
>
> *City of Boerne v. Flores,* 117 S. Ct. 2157, 2168 (1997).

Is it not just as dangerous for a self-proclaimed "disinterested and detached" Court to "define its own powers?"

No person in American history provides a more stark contrast to this Court on the ability to properly handle power than the nation's first President, George Washington. A mere "layman" obviously far less "disinterested and detached" than any member of this Court, Washington chose to accept constitutional limitations on his own power. In 1796, after leading the nation to Independence from Great Britain, serving as president of the Constitutional Convention of 1787 and twice as President of United States, he gave his Farewell Address[3] to his fellow citizens on the ninth anniversary of the adoption of the Constitution in Philadelphia:

> It is important in those . . . entrusted with [the Constitution's] administration to confine themselves within their respective constitutional

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[3] *See* Kaufman, B. A., Washington's Farewell Address: The View from the 20th Century (Chicago/Quadrangle Books/1969), at pp. 15-30.

> spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power and proneness to abuse it which predominates in the human heart is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal against invasion by the others, has been evinced by experiments ancient and modern, some of them in our country and under our own eyes. . . . *Id.* at note 3.

With sagacious foresight, Washington described what this Court has become:

> They serve . . . to put in the place of the delegated will of the nation, the will of a party, often a small but artful and enterprising minority of the community. They are likely in the course of time and things to become potent engines by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people, and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion. *Id.* at note 3.

And, in words close to those used by Chief Justice Marshall in the *Marbury* case, President Washington said of the Constitution:

> Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true liberty. The basis of our political systems is the right of the people to make and to alter their

> constitutions of government. **But the Constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all.** (bold emphasis added) *Id.* at note 3.

Judges, especially, have a "sacred obligation" to uphold the peoples' exclusive right "to make and to alter their constitutions of government." As Chief Justice Marshall wrote in *Marbury*:

> . . . the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!
>
> Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?
>
> If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.
>
> 5 U.S., at 179-180.

During the succeeding 200 years of American history since *Marbury*, never, not even once, has this Court acknowledged these words of Chief Justice Marshall about the constitutional oath of office taken by judges. This omission is understandable, though, given the ferocity of Marshall's condemnation of judges who would disregard the Constitution as a binding "rule of government" for them – judges who would, for instance, seek the power to become "interim legislators."

Article VI of the Constitution prescribes that the oath of office is to "this Constitution," that is the one "established by the people of United States." U.S. CONST. Art. VI, pmbl. To reject this is to reject what Chief Justice Marshall described in *Marbury* as "the greatest improvement on political institutions – a written constitution . . . in America, where written constitutions have been viewed with so much reverence. . . . " *Id.* at 178. Nowhere does the Constitution provide for an oath of office to support what the Justices of this Court, rather than people of this country, have declared to be the "fundamental principles" of government. Nowhere has this Constitution been amended to say that in recognition of the superior ability of this Court for "disinterestedness and detachment," the people have turned over to the members of this Court the power to resolve important social issues in America from one generation to the next. Nowhere does the Constitution provide that the Justices of this Court are authorized to look for surreptitious or hidden meanings in the constitutional text, and so to amend it without the "authentic and explicit act of the whole people" said to be required by President Washington.

From the beginning, even under Chief Justice Marshall, this Court was presented with the opportunity to pursue the enlargement of its own powers by unconstitutional means. Only four years prior to *Marbury*, in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387-388 (1798), Justice Chase had already argued that the judiciary should have extra-constitutional powers to declare the "great first principles of the social compact." And the Constitution's Fifth Amendment already contained a "due process" clause which was vulnerable, along with every other unsuspecting provision of the Constitution, to this Court's conscription as "wildcards" to expand the Court's powers.

But in the *Marbury* case in 1803, Chief Justice Marshall firmly grounded the role of the American judiciary in the Constitution alone, not in any extra-constitutional powers that the judiciary might wish to explore. The basis for the doctrine of judicial review, as set out in *Marbury*, was the duty of judges, as required by their oaths of office, to apply as constitutional law those "fundamental" and "permanent" principles which "the people have an original right to establish." *Id.* at 176-77, 180. Comparing "ordinary legislative acts" to these principles declared by the people to be "fundamental" is the "essence of judicial duty," wrote Marshall. *Id.* at 177-78. Therefore, when members of this Court assert the power to declare what they, rather than the people, have deemed to be "fundamental" in American law, they not only act "unjudicially" but also destroy the very basis for constitutional review enunciated in *Marbury*.

II. The Members Of This Court, Consistent With Their Oaths Of Office To The Constitution, Should Uphold The Peoples' "Fundamental Principle" Diffusing Authority To Decide Church-State Issues Among The Many Jurisdictions Of The States Rather Than Centralizing That Authority In A Federal Jurisdiction.

One of the most important "fundamental principles" established by the "people of the United States" when they adopted the First Amendment to the Constitution as an express limitation on the power of Congress – was to diffuse authority to decide church-state issues among the many jurisdictions of the States rather than centralizing that authority in a federal jurisdiction. *See* Letter from

Honorable Fob James, Jr., Governor of Alabama, to the Honorable Ira DeMent, Judge for the United States District Court for the Middle District of Alabama (June 23, 1997) (fully set out in the Appendix, App. 223-256), at App. 225-232, hereinafter the "DeMent letter." More than anything else the framers feared making the federal government the battleground for national church-state policies. App. 227-230.

Moreover, as this Court admitted to be true in the 1959 *Bartkus* case, the people who wrote and ratified the Fourteenth Amendment did not intend to dismantle this original constitutional structure which left church-state policies and certain other matters to the states. Justice Frankfurter spoke for the Court:

> We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such. The relevant historical materials have been canvassed by this Court and by legal scholars. These materials demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States. *Bartkus*, 359 U.S., at 124.

In this, the Court was correct.

Seven years after passage of the Fourteenth Amendment, Congress after months of consideration had declined to adopt a proposed constitutional amendment, one requested by President Grant, that would have explicitly made the First Amendment's religion clauses "applicable to the States."[4] The debates from the 44th Congress reveal that the central issue was whether the authority to define the "fundamental rights" of "religion and conscience" would remain with the people of each State, or would now be vested in federal authorities.

Senator Frelinghuysen of New Jersey supported the amendment:

> There is, sir, no room for two opinions on the two propositions that religion and conscience should be free, and that the people should not be taxed for sectarian purposes . . . and nothing could be clearer than that these fundamental rights should be secured in [the] Constitution. . . . Thus the article . . . prohibits the States, for the first time, from the establishment of religion, from prohibiting its free exercise, and from making any religious test a qualification to office. 4 CONG. REC. 5261.

Senator Kernan of New York opposed the amendment:

> That provision [the proposed text] has my most hearty commendation; but for all that it is not necessary to put it in the Federal Constitution. That matter was discussed in the convention that made the Constitution, and it was not thought wise to put in any such provision, but to leave it to the States. . . . There is a provision in the constitution [of New Hampshire] that no one can be elected governor unless he is of the Protestant religion, and so as to members of the Legislature of the State. But I am willing to trust

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[4] The proposal introduced by James G. Blaine, as passed by the House, provided that, "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof . . . and that no money raised . . . for the support of public schools. . . . shall ever be under the control of any religious sect or denomination. . . . " 4 CONG. REC. 5580 (1876).

> that to the people of that State, believing that very soon in this age of ours and in this country of ours they will adopt the liberal provisions which are found in the constitutions of the other States on the subject of the sacred rights of conscience. 4 CONG. REC. 5581.

Senator Morton of Indiana, a proponent, said:

> What guarantee have we in the States? A majority of the people of a State can change the Constitution of that State and according to the doctrines we have heard here tonight, doctrines I think that will startle this nation, we are told that the States must be left free, if they desire to do so, to establish a church, to establish denominational schools, and maintain them at public expense. . . . What is the reason the States cannot do it? He will say that in most of the constitutions there are provisions preventing them; but my friend knows very well that the majority who made those constitutions can unmake them. 4 CONG. REC. 5591-5592.

Senator Bogy of Missouri, an opponent, said:

> And among the most sacred of these rights, lying at the very foundation of all liberty, was that of freedom of conscience and the right to worship God according to the dictates of each one's individual conviction. That was left to the States, and was not placed in the hands or under the control of the Federal Government. The attempt here to exercise this power takes from the States that right and gives it to the Federal Government. . . . Mr. President, the safety of this Government is in the denial of all such powers to the Federal Government. Keep it where the fathers placed it, in the States, and maintain it there. . . . 4 CONG. REC. 5591.

The proposal, after the Senate amended the House version, failed to obtain the required two-thirds vote for passage in the Senate. 4 CONG. REC. 5595.

Thus, the original "fundamental principle" of the Constitution and its First Amendment vesting jurisdiction exclusively in the people of each State to make their own laws on issues of religious freedom – is still the "supreme law of the land," which every Justice of this Court, and every person who takes the constitutional oath of office, is bound to obey. Yet, the Justices of this Court insist on disobeying the "supreme law", by taking for themselves an unconstitutional power to decide religious issues for the whole nation.

III. The "People Of The United States" Have Not, Through Their Moral Failings Or Otherwise, Forfeited Their Right To Decide The "Fundamental Principles" Of Government Into The Hands Of This Self-Avowed "Disinterested And Detached" Court.

There is incongruity in requiring a witness "under oath" to tell the truth about the facts of a case while on the witness stand, and allowing a judge "under oath" to tell a lie about the Constitution while on the Bench. Perhaps this is why this Court has sought to divert attention from that incongruity by focusing instead, in a wide array of cases, on the assumption that the people of this country are so morally flawed that they have forfeited their right to self-government under the Constitution.

In *Casey*, for instance, Justice O'Connor anchors her contention that this Court must have complete power over social policy in America – in the record of historical prejudice against African-Americans in this country. No one can candidly deny this shameful record. And so

Justice O'Connor cites state laws against interracial marriage as a reason the Court must be able to define "fundamental rights," *Casey*, 505 U.S., at 847-48, and then she moves fluidly through various other social objects dear to the Court's majorities over the years, *id.* at 848-850; and finally she ends up with abortion, *id.* at 850-853. She justifies one by the other. This Court, and many in the legal community which support it, regularly use the fact that this nation was guilty of historical injustice against African-Americans as a battering ram against the people to take from them their constitutional right to self-government.[5] Like a predator the Court moves from issue to issue, always reminding the people of their failures, and where the people have not "failed", taking control of the issue anyway in order to keep the people under the Court's self-avowed "disinterested and detached" supervision.

It is undoubtedly true that the people of this country have the constitutional right, if they so choose, to march forthrightly into hell; but they should not be taken there, blindfolded and against their will, by the United States Supreme Court. *See Roe v. Wade, supra; cf.* Psalm 139:7, 13-16.

In *Casey*, Justice O'Connor disclaims personal "beliefs" about the value of unborn children as a basis for laws against abortion, 505 U.S., at 851, willfully ignoring that it is her own belief, an agnostic one, that governs her decision as a judge. Her personal "beliefs" allow her to close her own mind to the risk that abortion on the whole may be equivalent to murder; and she insists, with this Court's majority, that the whole American government officially close its mind as well. Ironically Ronald Reagan, who appointed some of the current abortion majority, used to say that society should resolve the "doubt" about abortion in favor of life, not against it. If there was ever any "doubt" that this Court hesitates before imposing its own "beliefs" on the nation, the abortion issue has removed it once and for all.

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[5] *See* Pamela Sumners, *Beware the Agenda of Alabama Theocrats Who Would Establish a State Religion*, INSIGHT ON THE NEWS, Jan. 5, 1998, at 25, wherein the counsel for respondents in this case energetically uses this technique: "Poor benighted Alabama – again the laboratory of a states' rights experiment by its elected officials; the butt of the national joke, again evoking images of Bull Connor instead of the vision of a vibrant 'new south,'" at 25.

Baseball says a lot about America. And there is one absolute pre-condition for the game, an assumption so deeply and subconsciously held that it is always taken for granted; and if it ever were called into question, a profound horror would envelope the game and all those who have ever experienced the heartbeat of the game. We speak, of course, of the absolute trustworthiness of the umpires, and we can especially picture in our minds the one behind home plate in the major leagues. The whole game rests on the integrity of this man. All of the time and all of the training and all of the emotion since childhood of every player on the field, and in the dugout, and every intense coach who ever put his energy into the life of one of these players, and every fan who is joined in heart and soul to these players in the unity of the will to win, depends on this man.

The umpire behind home plate, his face shrouded in a mask, carries a mantle of authority rarely equaled in American society. The manager for either team can get in his face, kick dirt into the air, curse his calls, but no matter how dire the manager's presence, it is a foregone conclusion before the confrontation ever begins that the will of the umpire will prevail. The thought that this man, this umpire, would show partiality – that he would bend the rules of the game to affect the outcome, is an abhorrent thought. It is an unthinkable thought. It is a peculiarly un-American thought.

It is "emphatically the province and duty of the judicial department to say what the law is," wrote Chief Justice Marshall in *Marbury v. Madison*. 5 U.S., at 177. It is emphatically the judicial duty, he taught in that case, to insist on fidelity to the "fundamental" and "permanent" law made by the ultimate lawmakers – the people themselves – who have expressed their will through their representatives in a written Constitution. The "government of the United States" is "emphatically . . . a government of laws, and not of men," the Chief Justice wrote. *Id.* at 163.

Judges, like umpires, can be forgiven for mistakes in what they saw. What is unforgivable is for them to deliberately look the other way to avoid seeing what they do not wish to see. Judges have no more authority to add to the Constitution than umpires have to add to the rules of the game of baseball. There can be no greater violation of the judicial oath, no greater degradation of the judicial office, than to usurp from the people the power to decide "what must be preserved and what must be changed, what we shall protect and what we shall abandon. . . . " *See* "Brennan Speech" *supra* at 2.

Article V of the Constitution vests the power of constitutional amendment exclusively in state and congressional legislative authorities, not in this Court. Article I vests "all legislative powers. . . . in a Congress of the United States", not in this Court. But neither Article V nor Article I, nor the oath of office in Article VI, has prevented this Court from taking for itself constitutional authority which belongs to others. This Court has disdained its role as a constitutional umpire and sought instead to establish as a rule of government its own will rather than that of the people.

In *Marbury*, Chief Justice Marshall simply assumed the perpetual integrity and honesty of the members of this Court. History, regrettably, has confirmed the more realistic views on human nature of President Washington in his Farewell Address, and of the nation's third President, Thomas Jefferson:

> . . . You seem . . . to consider the judges as the ultimate arbiters of all constitutional questions – a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. . . . Our judges are as honest as other men, and not more so. . . . They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is, "Boni judicis est ampliare jurisdictionem"; and their power is the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that, to whatever hands confided, with the corruptions of time and party, its members would become despots. Letter to Jarvis (1820), quoted in THE REAL THOMAS JEFFERSON 498 (1983) (National Center for Constitutional Studies)

The Constitution says nothing at all about the judiciary being the "ultimate arbiter" of constitutional questions. The claim by this Court and lower courts for such an ultimate power rests, like this Court's claim to be the most "disinterested and detached" of all officials, on self-promotion.

In his Farewell Address, President Washington recognized no superior trustworthiness in the judiciary on constitutional questions; rather, he emphasized the necessity of "reciprocal checks in the exercise of political power" and the necessity of making each branch of government "the guardian of the public weal against invasion by the others." Jefferson left no doubt that he would refuse to enforce a Supreme Court decision if doing so was necessary to preserve the Constitution from destruction by judges. Lincoln, in his First Inaugural Address, warned, "[I]f the policy of the government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having . . . practically resigned their government into the hands of that eminent tribunal." ABRAHAM LINCOLN: COMPLETE WORKS 5 (J. Nicolay & J. Hay eds. 1920).

Despite these warnings, the nation is now faced with a Court which asserts the power to "evolve" the "fundamental principles of our society," thereby effectively claiming that whatever it says about the Constitution – even if fraudulent, must be obeyed as the "supreme law." Thomas Jefferson called this "despotism." George Washington called it the "unjust dominion" of "cunning, ambitious, and unprincipled men." John Marshall called it a "crime", a "solemn mockery" of the constitutional oath of office. *Marbury,* 5 U.S., at 180.

Only by accepting defined constitutional limitations for itself may this Court rightfully demand the same of others. *Marbury v. Madison.* In the absence of this Court's acceptance of constitutional limitations, other constitutional officials throughout government owe no "deference" to the decisions of this Court. "How immoral" for this Court to impose its unconstitutional decisions on other officials of government, including other judges, who then become "knowing instruments, for violating what they swear to support!" *Marbury,* 5 U.S., at 180; *accord Jaffree v. James,* 554 F. Supp. 1104, 1127 (S.D. Al. 1983).

No constitutional official of integrity should exercise the authority of his or her office so as to legitimize this Court's claims of unlimited power. No one in America is above the law, including the Justices of this Court. The oath of office taken pursuant to Article VI is not to this Court, but to "this Constitution" established by "the people of the United States", the very "people" that this Court regularly accuses of being incapable of restrained self-government.

In the church-state arena, for instance, this Court invokes the specter of European religious wars, official state churches, and all sorts of religious intolerance – as if to say these things will occur if the people are allowed to govern themselves in matters of religion. *See Engel v. Vitale,* 370 U.S. 421, 425-30, 432-35 (1962).

Ironically, the people of the American States, some of which had official churches at the time of the Constitution's adoption, disestablished them of their own choice during the 19th-century.[6] Moreover, since Independence from Great Britain the record of the American people on issues of religious freedom has been generally excellent, with virtually all States opting explicitly to protect the rights of individual conscience for at least the last 100 years.[7] And in the few examples the Court could give in the twentieth century of unwise state or local laws affecting religion, the laws in question came mostly out of a misguided secular, not "religious", motivation. *See, e.g., Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

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[6] *See* Stokes, Anson Phelps, Church And State In The United States, 51, 418, 427-46 (1950).

[7] *See, e.g.,* ALABAMA CONSTITUTION (1901), pmbl. (invoking guidance of Almighty God); Art. I, Sec. 1. (recognizing endowment by Creator of inalienable rights); Sec. 3. (prohibiting religion established by law, compulsory tithing,

Nevertheless this Court continues cynically to exercise political power, by allying itself with like-minded Congressional minorities willing to filibuster or otherwise engender political stalemate, in order to enable this Court to impose its agendas on the nation with impunity. But there is nothing new in this.

Even before the Civil War this Court exploited a national political stalemate to unconstitutionally create a slave holder's fundamental "right" to keep his slaves in "free" U.S. territories where Congress had earlier prohibited the extension of slavery. *Dred Scott v. Sanford*, 60 U.S. 393 (1856) (reasoning that to deny a slaveholder's "right" to take his slave "property" to free territories "could hardly be dignified with the name due process of law," *id.* at 450). During the first part of this century this Court unconstitutionally created additional "fundamental" principles to protect the Court's then favored economic interests from legislative regulation such as minimum wage laws. *See Adkins v. Children's Hospital of the District of Columbia*, 261 U.S. 525 (1923). For the better part of the rest of this Century, this Court has unconstitutionally pursued its favored social agendas by creating a myriad of so-called "fundamental" rights, including a right to an abortion, *Roe v. Wade*, a "right" to peddle pornographic depictions of rape and bestiality, *America Booksellers*

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religious test for public office, or religious qualification for civil rights).

Assoc. v. Hudnut, 771 F.2d 323, 324, 331 (7th Cir. 1985), *affirmed* 475 U.S. 1001, 106 S. Ct. 1172 (1986), and a "right" to have the Ten Commandments removed from the schoolhouse wall, *Stone v. Graham*, 449 U.S. 39 (1980).

At present in Alabama, U.S. District Judge Ira DeMent has threatened to use his "contempt" power to financially ruin or put in jail those teachers or coaches who might pray to the Almighty with their students or athletes in the schools or at school events. App. 272. A $250,000 fine is the figure the judge has verbally mentioned to the lawyers. This judge has also employed a "monitor," which is more aptly described as the "prayer police," to investigate the schools and report back to him on which teachers, or coaches, or students, or school principals might be engaging in "illegal" prayer. App. 270-272.

There were teachers who, upon hearing that President Reagan had been shot in 1981, led their classes in prayer to God to spare the President's life. They did so at the personal risk of being sued under this Court's unconstitutional "precedents." In the prayers of teachers like these – lies the hope of America.

In the grand tradition of this Court, however, Judge DeMent accuses teachers like these who offer heartfelt prayer to God, even in a time of national vulnerability or crisis, of religious "coersion" of any students who do not wish to hear the prayers of others. Who is guilty of "coercive religious practices," App. 86-87, Alabama teachers or coaches or students who express public dependence on God, or the judges who intend to compel them into silence by penalty of jail or financial ruin?

This Court requires a religious schizophrenia on the part of United States citizens, so that if they hold a government job such as a teacher or a coach, they must hide their real personality, or repress their faith, while on the job. These are people of faith in the practical sense, people who cannot in their own consciences be one thing in "private" and another in "public". Although they believe they cannot succeed at their jobs without the actual blessing of God upon them, they are forbidden by this Court from publicly acknowledging this dependence while at school, and are required instead to profess by their silence a secular sufficiency for their undertakings.

Perhaps this Court thinks public school teachers or coaches who will not hide their faith while on the job are unfit for public employment? Or perhaps these people of faith in God should be consigned to religious ghettos, since their very presence in the public square is such an offense to the members of this Court?

According to this Court, "religious belief" must not be given public expression in the schools. *Engel*, 370 U.S., at 422, 430; *Abington School District v. Schempp*, 374 U.S. 203, 219, 222 (1963). This seems quite incredible in a nation whose very existence began with a Declaration of Independence which expressed public, official, and corporate "religious belief" in the "Creator" and "Supreme Judge of the world", whose help was very much needed at the time. Moreover, this Court's claim that it remains "neutral" among any and all religious beliefs, *Schempp*, 374 U.S., at 215, 218, 221, besides being logically impossible, is belied by this Court's willingness to silence the expression of religious belief with which it disagrees by force. "Put monitors in the schools to look for illegal prayer," say the federal courts. "[I]t is fit and becoming in all people, at all times, to acknowledge and revere the Supreme Government of God . . . [that] the united prayer of the nation may ascend to the Throne of Grace . . . ," says Lincoln. *Proclamation of a Day of Fasting,* Aug. 12, 1861.

We in Alabama fully intend to protect, as our state Constitution requires, and with sensitivity and respect, the rights of individuals who wish to participate in public religious expressions, as well as the rights of those who do not wish to do so. This includes respecting the wishes of parents as to their own children. We agree with the "religious beliefs" of James Madison that a person's expression of faith to God is beyond the power of another person to control. *See* DeMent letter, App. 250-251, 253. For this reason a majority should never be allowed to compel a minority to perform a "religious" duty. Neither should a minority be allowed to prevent a majority from exercising their faith according to their consciences.

The "equal right . . . of conscience", spoken of by James Madison, is as true on public ground as on private. App. 252-253. Whether prayer is "personal" or "relational," "individual" or "corporate," "private" or "public," is up to those who pray and the God to Whom they pray; and not to the Justices of this Court. App. 251.

"Freedom of religion" is disappearing in America. Because of this Court, a few people claiming "freedom from religion" can silence others in public places such as schools. This may have precedent in the Soviet Constitution of 1918, which spoke of "real freedom of conscience" and the "separation of the school from the church",[8] but it has no precedent in the Constitution of Philadelphia or its amendments.

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[8] For the purpose of securing . . . real freedom of conscience, the church is to be separated from the state and the school from the church, and the right of religious and antireligious propaganda is accorded to every citizen. *Constitution of the Russian Socialist Federated Soviet Republic,* Article Two, Para. 13 (1918).

On August 17, 1790, upon a visit to Newport, Rhode Island, President George Washington in a now famous letter addressed what had been the largest Jewish community in the American colonies:

> . . . For happily the government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support. . . . May the children of the stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other inhabitants; while everyone shall sit in safety under his own vine and fig tree, and there shall none to make him afraid. . . . [9]

The previous day, Congregation Yeshuat Israel of Newport had greeted the President with these gracious words:

> With pleasure we reflect on those days – those days of difficulty, and danger when the God of Israel, who delivered David from the peril of the sword, shielded your head in the day of battle; and we rejoice to think, that the same spirit who rested in the Bosom of the greatly beloved Daniel enabling him to preside over the Provinces of the Babylonish Empire, rests and will ever rest upon you, enabling you to discharge the arduous duties of Chief Magistrate in these States.[10]

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[9] THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 284-86 (W.W. Abbot et al., eds) (Mark A. Mastromarino, ed.), University Press of Virginia (Charlottesville, 1996).

[10] *Id.* note 9.

This "Daniel" whose spirit the Newport synagogue wished upon President Washington was the ancient Hebrew prophet recorded in the Bible. Exiled to Babylon during the period of the first destruction of Jerusalem, but helped by God, Daniel rose to prominence in the pagan Babylonian kingdom. From the biblical book of Daniel, we learn that this Court is not the first institution in human history to assert the power to control when and where prayers to God may be said.

When King Darius the Mede ruled Babylon, and Daniel served under him as chief administrator, Daniel's political enemies sought his death by instigating a royal decree that would make the prayers Daniel uttered to God each day illegal. (Daniel 6:5,10 NKJ) Daniel prayed from the "upper room" of his house, "with his window open toward Jerusalem" (6:10), thus signifying his identification with that ancient city, then conquered and dilapidated, but symbolic of an unseen kingdom that would return to rule the earth.

It must have been quite an affront to the Babylonian mind set for its highest official under the king, a Jew from a conquered land, to prophesy the ultimate fall of Babylon and judgment of the world by the God of Israel:

> . . . And the stone that struck the image became a great mountain and filled the whole earth. . . . And in the days of these kings the God of Heaven will set up a kingdom which shall never be destroyed. . . . it shall break in pieces and consume all these kingdoms, and it shall stand forever. (Daniel 2:35,44)
>
> I was watching in the night visions, And behold, One like the Son of Man, coming with the clouds of Heaven! He came to the Ancient of Days. . . . Then to him was given dominion and glory and a kingdom, . . . His dominion is an everlasting

> dominion. . . . And his kingdom the one which shall not be destroyed. (7:13-14)

At the instigation of Daniel's enemies, King Darius issued a decree "that whoever petitions any god or man for thirty days, except you, O King, shall be cast into the den of lions." (Daniel 6:7) When Daniel knew that "the writing was signed" (6:10), he could have simply shut the windows of his house, or otherwise kept his prayers out of public view. Or, he could have reasoned that the decree was only for 30 days, and that for such a brief period, he could obey Darius over G-d.

But, " . . . with his windows open toward Jerusalem, he knelt down on his knees three times that day, and prayed and gave thanks before his God, as was his custom since early days." (Daniel 6:10) Then Daniel's accusers went to the King and, "according to the law of the Medes and Persians, which does not alter" (6:12), Daniel was "cast . . . into the den of lions." (6:16) The next day he was still alive. "My God sent His angel and shut the lions' mouth . . . because I was found innocent before Him; and also . . . I have done no wrong before you," Daniel told the king. (6:22)

And so, some 2500 years after Darius the Mede, the United States Supreme Court also presumes upon the God of Israel to control when and where prayer to Him by His people will be allowed. This, the people of Alabama have never done. This, the "people of the United States" have never done. This, the "Peoples'" Constitution has never done.

IV. The Conditions for granting the Writ prescribed by Supreme Court Rule 20 has been met.

A. There are exceptional circumstances present.

The immediate threat of the federal courts jailing or fining United States citizens in DeKalb County, Alabama, for praying in the schools, not because the U.S. Constitution prohibits it, but because the members of this Court are personally opposed to it, is an exceptional circumstance.

B. Relief cannot be had by any other court.

Although other courts pursuant to their oaths of office may rightfully refuse to follow, or implement, decisions of this Court which openly usurp from the people the constitutional authority to decide the "fundamental principles of our society," only this Court is in a position to restore to the whole nation the stability and integrity of constitutional government which has been lost.

C. The Writ will be in aid of this Court's appellate jurisdiction.

The restoration to this Court of an appellate jurisdiction based upon its legitimate role in our constitutional government, rather than an illegitimate role usurpative of the constitutional authority of others, will enable the Court to devote much more time to its legitimate role, with consequent benefits to this Court's exercise of its appellate jurisdiction as well as to the nation.

CONCLUSION

On the authority of the United States Constitution, the U.S. District Court should be ordered to dismiss this case for lack of a federal question:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land; . . . and all executive and judicial officers, both of the United States and of the several

> states, shall be bound by oath or affirmation, to support this Constitution;. . . .
>
> Done in convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred eighty-seven and of the independence of the United States of America the twelfth. *In Witness* whereof we have hereunto subscribed our names,
>
> George Washington –
> Presidt. and Deputy from
> Virginia.

U.S. Const. art. VI.

This Brief is dedicated to the people of Dekalb County, Alabama, who, like the "people of the United States" over two hundred years before them, have put themselves at risk for the sake of their own freedom and that of their children.

Respectfully submitted,

Robert B. French
Attorney for DeKalb County School Board
P.O. Box 680596
Ft. Payne, AL 35967
(205) 845-2250

Forrest H. James III
Attorney of Record for Governor Fob James, Jr.
300 Vestavia Parkway,
Suite 2300
Birmingham, AL 35216
(205) 823-8751

Counsel for Petitioners

APPENDIX

Michael CHANDLER, et al., Plaintiffs,
v.
Forrest H. "Fob" JAMES Jr., et al., Defendants.

Civil Action No. 96-D-169-N.
United States District Court,
M.D. Alabama,
Northern Division.

July 30, 1997.

ORDER

DE MENT, Judge.

Before the Court is Governor James' motion to dismiss filed July 22, 1997. In essence, the Governor invites this Court to (1) "overrule" or ignore years of Supreme Court precedent and, in so doing, (2) abdicate its duty, as the Court perceives it, to adhere to the hierarchy of authority among federal courts and, finally, (3) to effectively alter the balance of power between the coordinate branches of government. Although the Court appreciates the thoroughness of the Governor's research and the appeal of much of the Governor's argument, for the following reasons, the Court must respectfully decline the Governor's invitation.

First, to promote uniformity and stability in the law and to maintain the integrity of the judiciary this Court must follow the doctrine of *stare decisis*. Under this doctrine, this Court must accept as dispositive prior decisions of law made by the Supreme Court, the Eleventh Circuit Court of Appeals and/or this Court, in any case where the identical legal issue is raised. The same is true with respect to the Alabama Supreme Court and the appellate courts of Alabama when the legal issue is one of

State law. The importance of adhering to this doctrine is magnified in a case such as this where the legal issue in dispute has long been settled, rightfully or wrongfully, and is the touchstone for innumerable court decisions.

Second, even if the Court agreed with the Governor that the Supreme Court has misinterpreted the Fourteenth Amendment, this Court cannot simply ignore plainly applicable Supreme Court decisions. For any hierarchy of authority to be legitimate, decisions made at the top of that hierarchy must be followed by those below. As an Article III federal district court, this Court sits at the bottom of the hierarchy of the constitutionally-created federal judiciary and is duty-bound to follow the pronouncements of the Supreme Court.[1] The Court routinely explains to juries that, as a trial court, this Court does not make law, but instead must take the law as the Court finds it, like it or not. Here, the law is unequivocal; the protections of the First Amendment have, by the Supreme Court of the United States, been made applicable to the State of Alabama through the Fourteenth Amendment. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Finally, it is perhaps the most fundamental tenet of our judicial system that the Supreme Court is the ultimate arbiter of Constitutional interpretation. This principle was firmly established in 1803 when the Supreme Court decided *Marbury v. Madison* and was reaffirmed just over a month ago in *City of Boerne v. P. F. Flores*, 1997 WL 234322 at *10 (June 25, 1997). This principle is not only important to the orderly operation of our judicial system, it lies at the heart of the judicial branch's role as a "check" on the outer branches of our government. The Governor's invitation to ignore the Supreme Court's interpretation of the Fourteenth Amendment threatens to erode this principle and, consequently, poses a serious threat to our system of democratic self-government. For these reasons, the Governor's motion is due to be denied.

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[1] In the words of General Robert E. Lee, "Duty is the sublimest word in our language."

Accordingly, it is CONSIDERED and ORDERED that Governor James' motion to dismiss be and the same is hereby DENIED.

It is further CONSIDERED and ORDERED that Governor James' July 22, 1997, motion "for leave to file brief" be and the same is hereby DENIED.

DONE this the 30th day of July, 1997.

/s/ Ira DeMent
UNITED STATES
DISTRICT JUDGE

Michael CHANDLER, et al., Plaintiffs,
v.
Fob JAMES, et al., Defendants.

No. CV 96-D-169-N.

United States District Court, M.D. Alabama.

Dec. 17, 1997.

ORDER

DE MENT, J.

Before the court is a "Motion For Partial Stay Of Permanent Injunction" ("Defs.' Mot.") filed on November 10, 1997 by the Attorney General of the State of Alabama, the Alabama State Board of Education and its individual members, and the DeKalb County, Alabama, Board of Education and its individual members ("Defendants"). Defendants filed a "Memorandum In Support" ("Defs.' Mem. In Supp.") on the same date. Plaintiffs filed their "Opposition To 'Defendants' Motion To Stay' " ("Pls.' Opp'n") on November 18, 1997 to which Defendants filed a Reply ("Defs.' Reply") on November 24, 1997. On the same date, Plaintiffs filed their "Supplemental Opposition To 'Defendants' Motion To Stay' " ("Pls.' Supplemental Opp'n"), and the "Declaration Of Susan Jane Neely In Opposition To 'Defendants' Motion To Stay' Injunction" ("Neely Decl."). On December 5, 1997, Plaintiffs filed their "Reply To '[Defendants'] Reply to Plaintiffs' Opposition To Defendants' Motion For Partial Stay,' " ("Pls." Reply"), and the Declaration of John Woodfin ("Woodfin Decl.").[1] On December 4, 1997, counsel for the DeKalb

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[1] Woodfin's Declaration was originally filed in handwritten form as Exhibit B to Plaintiffs' Supplemental Opposition filed

County Board of Education and its Superintendent, filed a "Report to Court of Counsel of DeKalb County Board of Education, et al." ("DeKalb Sch. Bd. Report To Ct.") On December 15, 1997, Plaintiffs filed their "Additional Evidence In Opposition To Defendants' Motion For Stay." ("Pls.' Add. Evid.").

Defendants move the court, pursuant to Rule 62 of the Federal Rules of Civil Procedure, for a stay of sections 6(a), 6(b), 6(c), 6(d), 6(e) and 7 of the court's October 29, 1997 Permanent Injunction ("Permanent Inj."), pending review by the Eleventh Circuit Court of Appeals. (Defs.' Mot. at 1.) Defendants contend that these sections of the Permanent Injunction are "vague and overbroad." (Defs.' Mem. In Supp. at 1.) Plaintiffs argue that the "proscriptions are all specific and under the totality of the circumstances give . . . an extremely clear understanding of the conduct that is proscribed." (Pls.' Opp'n at 7.) After careful consideration of the arguments of counsel, as well as relevant law, the court finds that Defendants' "Motion For Partial Stay Of Permanent Injunction" is due to be granted as to twelve words of the court's three-thousand, seven-hundred and fourteen word Permanent Injunction, and otherwise denied.

DISCUSSION

On March 12, 1997, the court issued a Memorandum Opinion and Order finding unconstitutional Alabama Code Section 16-1-20.3, Alabama's fourth incantation of a

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November 24, 1997. The December 5, 1997 filing was typed and formally executed.

"school prayer" statute. *Chandler v. James*, 958 F.Supp. 1550, 1568 (M.D.Ala.1997). The challenge to the statute arose in the context of officially initiated, promoted and/or sanctioned religious activity that was occurring in the public schools of DeKalb County, Alabama. On October 29, 1997, the court issued a Permanent Injunction enjoining various state and local officials from enforcing Alabama Code Section 16-1-20.3. (*See* Permanent Inj. at 1-3.) The Permanent Injunction also prohibited a variety of officially initiated, promoted and/or sanctioned activities that the court found to be in violation of the First Amendment.[2] (*Id.* at 3-12.) Provisions were made to ensure compliance and to protect the rights of those citizens who were subject to the activity found unconstitutional. (*Id.* at 3-16.) In the Motion To Stay currently before the court, Defendants do not challenge those portions of the Permanent Injunction prohibiting enforcement of Alabama Code Section 16-1-20.3; their challenge is limited to specific sections of the Permanent Injunction applicable to DeKalb County, Alabama.[3]

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[2] In addition to the March 1997 Memorandum Opinion and Order, the court's findings were articulated in its November 1997 Supplemental Opinion and Order and November 1997 Memorandum Opinion and Order.

[3] The Defendants, speaking through the Attorney General, stated that they are "not challenging this Court's March 12, 1997 Memorandum Opinion, the factual record in this matter, or thirty years of controlling legal precedent. . . . For purposes of Defendants' Motion For Partial Stay, the Attorney General is only challenging certain provisions of this Court's October 29, 1997 Permanent Injunction." (Defs.' Reply at 2.)

For purposes of clarity, and in order to rectify convoluted interpretations of the terms of the court's Permanent Injunction, the court will: (1) state the applicable law; (2) restate the specific provisions of the Permanent Injunction that are at issue; (3) summarize the arguments of counsel; and (4) analyze the arguments of counsel in light of applicable law and the terms of the Permanent Injunction.

I. APPLICABLE LAW

A. Standard Of Review

Rule 62(c) of the Federal Rules of Civil Procedure provides that "the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." Fed.R.Civ.P. 62(c). In *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), the Supreme Court stated that:

> Different Rules of Procedure govern the power of district courts and courts of appeal to stay an order pending appeal. *See* Fed.Rule Civ.Proc. [sic] 62(c); Fed.Rule App.Proc. [sic] 8(a). Under both Rules, however, the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton, 481 U.S. at 2119 (citations omitted).[4] These factors "contemplate individualized judgment in each case, [and] the formula cannot be reduced to a set of rigid rules." *Id.*

Defendants urge the court to also consider their Motion under what they describe as the "alternate standard" outlined by the Eleventh Circuit in *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). (Defs.' Mem. In Supp. at 3.) There, the Eleventh Circuit, as quoted by the Defendants, stated that "[o]rdinarily the first factor is the most important . . . [b]ut the movant may also have his motion granted upon a lesser showing of a substantial case on the merits when the balance of equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay." (Defs.' Mem. In Supp. at 3 (citing *Garcia-Mir*, 781 F.2d at 1453).) Defendants argue that they are "not only likely to prevail on appeal, but the last three factors weigh heavily in favor of granting the stay. Therefore, the movants are entitled to prevail under the Eleventh Circuit's alternate standard." (*Id.*)

As an initial matter, the court notes that in *Garcia-Mir*, the Eleventh Circuit addressed an "emergency motion to stay" filed in the court of appeals, rather than in the district court in which the action originated. *Garcia-Mir*, 781 F.2d at 1451, 1453; *see also*, *United States v. Bogle*, 855 F.2d 707 (11th Cir. 1988) (applying factors articulated in *Garcia-Mir* in context of emergency appeal before the Eleventh Circuit and citing to Eleventh Circuit

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[4] The parties agree that these factors guide the court's analysis in assessing a request for a stay. (*See* Defs.' Mem. In Supp. at 3; Pls.' Opp'n at 5-6.)

Rule 27-1(b)).[5] The Eleventh Circuit specifically noted the "emergency" nature of the motion to stay at issue there, and noted the "extraordinarily high standards of review of motions for emergency stays." *Id.* at 1451, 1454. In contrast, the Motion To Stay at issue in this action was filed with this court, a United States District Court, not the Eleventh Circuit Court of Appeals, and is in a non-emergency posture.

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[5] Eleventh Circuit Rule 27-1(b) provides:

(b) Emergency Motions.

(1) A party requesting emergency action shall label the motion as "Emergency Motion" and state the nature of the emergency and the date by which action is necessary. The motion or accompanying memorandum shall state the reasons for granting the requested relief and must specifically discuss:

(i) the likelihood the moving party will prevail on the merits;

(ii) the prospect of irreparable injury to the moving party if relief is withheld;

(iii) the possibility of harm to other parties if relief is granted; and

(iv) the public interest.

Counsel filing the motion shall make every possible effort to serve the motion personally; if this is not possible, counsel shall notify opposing counsel promptly by telephone.

(2) If the emergency motion raises any issue theretofore raised in a district court, counsel for the moving party shall furnish copies of all pleadings, briefs, memoranda or other papers filed in the district court supporting or opposing the position taken by the moving party in the motion and copies of any order or memorandum decision of the district court relating thereto. If compliance is impossible or impractical due to time restraints or otherwise, the reason for non-compliance shall be stated.

(3) An emergency motion, whether addressed to the court or an individual judge, ordinarily should be filed with the clerk and not with an individual judge. To expedite consideration by the court in a genuine emergency, counsel may telephone the clerk and describe a motion that has not yet been filed in writing. This is not a substitute for the filing required by FRAP 27(a).

Utilization of the four Hilton factors in an "emergency" context ordinarily entails analysis of substantially more compelling factual and legal circumstances than in ordinary motions to stay. Predictably, that is why provisions are made for "emergency" motions, and why the factors may be entitled to different weight in that context. In an "emergency" appellate proceeding, emphasis may be placed on the likelihood of success on the merits, in part because the appellate court must determine that the trial court below was "clearly erroneous." *Garcia-Mir,* 781 F.2d at 1453. Once this determination is made, the likelihood of reversal on appeal may justify granting a stay, regardless of the other three factors. That is also why a showing of a "substantial case on the merits" coupled with the other three factors weighing heavily in favor of the movant may justify a stay. *See Garcia-Mir,* 781 F.2d at 1453. Hence, emphasis on the first factor, in those contexts, is warranted.

Tellingly, in *Hilton,* the Supreme Court was not addressing the standards utilized in "emergency" appellate proceedings, or "emergency" district court proceedings for that matter, and made no mention of applying heightened deference to the first *Hilton* factor in district court proceedings. *Hilton,* 481 U.S. at 776-77. The Court was careful to note, however, that "individualized judgments" must be made in each case, and that "the formula cannot be reduced to a set of rigid rules." *Id.* at 776.

Not only do Defendants conveniently fail to note the emergency, appellate, posture of *Garcia-Mir*, as opposed to the non-emergency posture of the Motion To Stay currently in this court, they also fail to cite the entirety of the Eleventh Circuit's relevant language in *Garcia-Mir* (the language quoted by Defendants is italicized):

> We must always be diffident in interposing the power of an appellate court into the province of the trial court and its orders save upon full briefing and mature reflection by this Court. The grant of an emergency motion to stay the trial court's mandate is thus an exceptional response granted only upon a showing of four factors: 1) that the movant is likely to prevail on the merits on appeal; 2) that absent a stay the movant will suffer irreparable damage; 3) that the adverse party will suffer no substantial harm from the issuance of the stay; and 4) that the public interest will be served by issuing the stay.
>
> *Ordinarily the first factor is the most important.* A finding that the movant demonstrates a probable likelihood of success on the merits on appeal requires that we determine that the trial court below was clearly erroneous. But the movant may also have his motion granted upon a lesser showing of a "substantial case on the merits" when the "balance of the equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay.

Garcia-Mir, 781 F.2d at 1453 (citations omitted). The emphasis placed on the first factor was clearly done in the context of an "emergency" appellate review of a district court order. Use of the *Garcia-Mir* standard by a district court would essentially require the court to determine that it was clearly erroneous in issuing a staying of its order(s). Such analysis would be more appropriate in determining a Rule 59 motion to alter or amend or a Rule 60 motion for relief from a judgment or order – not a motion to stay pending appeal.

Regardless of whether the court applies the *Hilton* factors without emphasis on one over the other, or whether the court applies the *Garcia-Mir* heightened emphasis on the first factor standard, an "individualized judgment" under either leads the court to the conclusion that Defendants' Motion To Stay is due to be granted as to twelve words of the court's three-thousand, seven-hundred and fourteen word Permanent Injunction, and otherwise denied. *See Hilton*, 481 U.S. at 776.

The first *Hilton* factor entails analysis of whether the applicant for the stay has made a "strong showing that he is likely to succeed on the merits," *id.*, while under *Garcia-Mir*, a stay may be warranted if the movant shows the "probable likelihood" of success on the merits. *Garcia-Mir*, 781 F.2d at 1453. This would require a determination that the trial court was "clearly erroneous." *Id. Garcia-Mir* also allows for the granting of a motion to stay upon a "lesser showing of a 'substantial case on the merits' when the balance of the equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay." *Garcia-Mir*, 781 F.2d at 1453. This "lesser showing" is thus nothing more than a conjunctive application of the *Hilton* factors without emphasis on one over the others. A stay is warranted if the movant satisfies all four of the elements articulated in *Hilton*. Indeed, the *Garcia-Mir* court noted that even if the movant's likelihood of success on the merits is "substantial," that alone will not support a stay "when the other three factors we must consider point so strongly in the other direction." *Id.* at 1455.

The court's Permanent Injunction was issued after much forethought and deliberation, based on its March 1997 Memorandum Opinion And Order and on its findings based on its review of the record as articulated more fully in its November 1997 Memorandum Opinion And Order and November 1997 Supplemental Opinion And Order. Upon issuance of its Permanent Injunction, the court did not consider the provisions at issue here to be clearly erroneous then, and it declines to so find now. Nor does the court consider the majority of the Attorney General's objections, arguing that the Permanent Injunction tramples free expression in its proscription of state established religion, to be well founded.

The court finds that Defendants have neither shown that they are likely to prevail on the merits nor that they have a substantial case on the merits. Apparently the court's forty page March 1997 Memorandum Opinion And Order, the court's seventeen page October 1997 Permanent Injunction, the court's twenty-four page November 1997 Memorandum Opinion And Order, and the court's sixty-two page November 1997 Supplemental Opinion and Order did not make the court's findings sufficiently clear or were ignored: the religiously coercive practices that were ongoing in DeKalb County, Alabama, violate the First Amendment to the United States Constitution as interpreted by the United States Supreme Court and the Eleventh Circuit Court of Appeals. These violations necessitated the court's Permanent Injunction.

The court is aware of the narrow scope of the Defendants' Motion; Defendants merely contend that the provisions of the Permanent Injunction proscribing unconstitutional conduct are "vague" and "overbroad," and that they accordingly "hinder" free expression, not that the underlying actions enjoined are permissible.[6] Nevertheless, as the court has previously made clear, and as the court finds now, given the state of current First Amendment jurisprudence, as articulated by courts with direct authority over this court, as well as the legal standards applicable to the issuance of permanent injunctions, the Defendants have not made a "strong showing" or exhibited a "probable likelihood" of success on the merits. With the exception of a portion of section 6(a) discussed infra, the court finds that the Permanent Injunction meets its remedial purpose of proscribing unconstitutional conduct without unduly burdening free expression rights. *See, e.g., Lucero v. Trosch*, 121 F.3d 591 (11th Cir. 1997) (*citing Schenck v. Pro-Choice Network*, ___ U.S. ___, 117 S.Ct. 855 (1997), and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), and utilizing analysis of whether injunction provisions burden more speech than necessary to serve relevant government interests). Indeed, this court champions the free expression rights of the citizens of the State of Alabama and of the United States, exercised, of course, in concert with other First Amendment rights.

The court finds the portions of Plaintiffs' Memorandum In Opposition regarding Defendants' likelihood of success on the merits on appeal to be clear, concise, eminently well written, and most importantly, a correct review of applicable law. Accordingly, the court adopts those portions of Plaintiffs' Memorandum In Opposition as herein articulated:

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[6] *See* note 3, *supra*.

> The October 29 injunction should have come as no surprise to anyone at all familiar with Establishment Clause jurisprudence. Public school officials have long been prohibited by the Establishment Clause of the First Amendment to the United States Constitution from inserting religious exercises into school activities. *See, e.g., Lee v. Weisman*, 505 U.S. 577 (1992) (prayer at graduation assemblies); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (requirement to teach "creation science"); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (daily prayer in public school classrooms); *Karen b. v. Treen*, 653 F.2d 897 (5th Cir.), *aff'd per curiam*, 455 U.S. 913, 102 S.Ct. 1267, 71 L.Ed.2d 455 (1982) (classroom prayer by students or teachers); *Stone v. Graham*, 449 U.S. 39 (1980) (posting copy of Ten Commandments on public school classroom walls); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (statute prohibiting the teaching of evolution); *Abington Schl. Dist. v. Schempp*, 374 U.S. 203 (1963) (Bible reading before class by student volunteers); *Engel v. Vitale*, 370 U.S. 421 (1962) (nonsectarian prayer at beginning of school day); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (religious instruction on school property during school day).

These unconstitutional school-sponsored activities are not transformed into constitutional activities by the involvement of willing students. *See Schempp,* 374 U.S. 203 (student-led devotional readings in the classroom); *ACLU v. Black Horse Pike Regional Bd. of Educ.,* 84 F.3d 1471 (3d Cir. 1996) (*en banc*) (student-initiated prayer at graduation); *Ingebretsen v. Jackson Public Schl. Dist.,* 88 F.3d 274 (5th Cir.), *cert. denied,* ___ U.S. ___, ___ S.Ct. ___ (1996)[7] (student initiated prayer at compulsory and noncompulsory school sponsored events); *Jager v. Douglas County Bd. of Educ.,* 862 F.2d 824 (11th Cir.), *cert. denied,* 490 U.S. 1090 (1989) (student-led prayers and invocations at high school sporting events)[8]; *Hall v. Board of Schl. Comm'rs of Conecuh County,* 656 F.2d 999 (5th Cir. Unit B 1981) (student-led morning devotionals over the school intercom);

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[7] *Ingebretsen,* constrained by *Jones v. Clear Creek Independent School District,* (5th Cir. 1992), held that "nonsectarian, nonproselytizing student-initiated prayers" at graduation ceremonies did not violate the Establishment Clause, while simultaneously holding that those same prayers at all other school-sponsored compulsory or noncompulsory activities did. The Fifth Circuit is the only Circuit to adopt the graduation ceremony exception to the Establishment Clause, and the Fifth Circuit's rule is directly defiant of *Lee v. Weisman.*

[8] Although one might think that any claim of success on appeal in the Eleventh Circuit would focus on the leading Eleventh Circuit case, *Jager v. Douglas County Board of Education,* 862 F.2d 824 (11th Cir.), *cert. denied,* 490 U.S. 1090 (1989), *Jager* is almost completely absent from the Attorney General's discussion, making only a brief parenthetical appearance on page 13 of the Motion for Partial Stay.

Collins v. Chandler Unified Schl. Dist., 644 F.2d 759 (9th Cir. 1981) (student-led prayer at school assemblies); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd per curiam*, 455 U.S. 913 (1982) (student-led prayers in the classroom).

The "free exercise" and "free speech" rights of students do not trump the Plaintiffs' rights to be free of Establishment Clause violations. The plaintiffs have argued this since the inception of this case, and the court so found in citing *Barnette, Schempp,* and *Jager*. None of this record supports the Attorney General in what the plaintiffs take to be a motion to stay premised on the allegation that the injunction amounts to viewpoint discrimination, and the pretense that it does is at odds with the record.[9]

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[9] This Court might well say, like the *Ingebretsen* court:

The Attorney General's . . . proffered secular purpose of prayer at student sporting events – prohibiting viewpoint discrimination – must be rejected out of hand. While the United States Supreme Court has recognized that prohibiting viewpoint discrimination may serve a secular purpose, *see Mergens*, 496 U.S. at 248, 110 S.Ct. at 2370, the Attorney General has not shown that any of the forums where student prayer is authorized under the statute are open forums and that religious groups have been denied access. The *Mergens* line of cases cited by the Attorney General involves situations where religious groups sought access to public school facilities and were denied for fear that access to these facilities by religious groups would violate the Establishment Clause. . . . We are not faced with such a situation here. Student assemblies, student sporting events, graduation or commencement, and other school-related activities ostensibly are not open forums in public schools. By granting prayer an exalted status over other types of speech in these forums, the state runs the grave risk of favoring one religion over another or favoring religion over irreligion. *See*

Relatedly, free speech rights are not absolute. Where "the degree of captivity makes it impractical for the unwilling viewer to avoid exposure," a speaker does not have the absolute right to say exactly what he wants. *Erznoznick v. City of Jacksonville,* 422 U.S. 205, 209 (1975). While a speaker "clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it." *Lehman v. City of Shaker Heights,* 418 U.S. 298, 307 (1974) (upholding a ban on political ads in rapid transit cars based upon the captive audience). *See also Frisby v. Schultz,* 487 U.S. 474, 487-88 (1988) (allowing a city to limit picketing in front of homes so as to protect persons from unwanted speech while at home).

Students enjoy even less freedom to speak their minds while under the supervision of the public schools. In *Bethel School District v. Fraser,* 478 U.S. 675 (1980), cited by the Attorney General, the Court recognized that the free speech rights of students are not co-extensive with the free speech rights of adults. *Id.* at 682. The *Fraser* Court also noted "the obvious concern on the

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Board of Educ. of Kirvas Joel v. Grumet, 512 U.S. 687 (1994). *Ingebretsen,* 864 F.Supp. at 1490.

The record here shows no instance in which a religious group has ever been denied anything in DeKalb County. Quite the opposite is true; the Gideons have been handed the classrooms. The plaintiffs repeat, as they have argued throughout this case, that violating the Establishment Clause is not a free speech or free exercise right.

part of parents and school authorities . . . to protect children – *especially in a captive audience* – from exposure to" certain speech in school assemblies. *Id.*, 478 U.S. at 684 (emphasis added). *See* Mem. Op., Mar. 12, 1997 at 21 (*quoting Fraser.*)

Previously, in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), the Court discussed the limitations on students' rights to speak freely: "[C]onduct by the student, in class or out of class, which for any reason – whether it stems from time, place or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513. See Mem. Op., Mar. 12, 1997 at 20 (*quoting Tinker*). While the Supreme Court held that the *Tinker* student had a First Amendment right to enage [sic] in the activity at issue (the wearing of a black armband), it first held that this speech did not "impinge upon the rights of other students." 393 U.S. at 509.

The *Jager* court addressed the same concerns raised by the Defendants in this case, and concluded that student-initiated prayers, even at "noncompulsory" events such as football games, violate the Establishment Clause.

In *Jager,* the defendant high school had a practice of permitting prayers and invocations immediately prior to the high school's home football games. *Jager,* 862 F.2d at 826. The prayers were explicitly Christian, "frequently invok[ing] the name of Jesus Christ," and were delivered by members of the local Protestant clergy. *Id.* at 826, 841 n. 2. Since at least 1947, these pregame prayers had been a part of the defendant's football season. *Id.* at 841 n. 2. In response to complaints about the old policy, the school developed a new policy:

> All school clubs and organizations can designate club members to give invocations and any student, parent, or school staff member can seek to deliver an invocation . . . the student government will randomly select the invocation speaker and no ministers will be involved in selecting invocation speakers or in delivering incovations. In addition, the schools will not monitor the content of the invocations.

Jager, 862 F.2d at 827.[10] Despite these innovations, the Jager court still concluded that the policy was in violation of the Establishment Clause.

Lee indicates how right the Eleventh Circuit was in *Jager.* The Supreme Court's holding in *Lee* is summarized in its last paragraph which, like the vast majority of the decision, makes no reference to the fact that the prayer was offered by clergy under some particular guidelines and does not take into account the identity of the speaker:

> The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. *No holding by this Court suggests that*

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[10] As noted earlier, this was not an official Douglas County School Board policy but rather, vested discretion in school principals.

> *a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.*
>
> *Id.* at 599 (emphasis added). In short, the sole *relevant* facts are the same here as in *Lee:* (1) prayer in a school program, and (2) a coerced plaintiff.

(Pls.' Mem. In Opp'n at 32-38.) Based on the foregoing, the court finds that the first *Hilton* factor cuts against the Defendants.[11]

In addition, the other three *Hilton* factors strongly favor Plaintiffs' position. The second and third factors essentially require the court to weigh the harm that Defendants may incur absent a stay against the harm that Plaintiffs may incur should a stay be granted. Defendants argue that "the movants and other citizens of Alabama are likely to suffer irreparable harm if this Motion is not granted." (Defs.' Mot. at 2.) Closely associated with the court's analysis of the second and third factors are Defendants' contentions regarding the fourth factor: "whether the granting of the stay would serve the public interest." Defendants argue that "the public interest would be served by granting [a stay] in order that the status quo may be preserved pending appeal." (Defs.' Mot. at 2.) Essentially, the Attorney General argues that because he reads the injunction as unduly limiting free expression rights, the better path would be to preserve the status quo pending appeal. Plaintiffs counter that "the *status quo* has been an illegal state of affairs in DeKalb County, Alabama." (Pls.' Opp'n at 6 (emphasis in original).)

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[11] The court addresses the hypotheticals proffered by the Attorney General in support of his "likelihood of success on the merits" argument, infra.

As noted, the court finds that Defendants have not shown a likelihood of success on the merits; specifically, that the court's Permanent Injunction does not unduly burden free expression rights in its preservation of individual liberties and proscription of state established religion. Additionally, throughout its previous Orders, the court has expressed its findings that public policy favors Plaintiffs in this action. The status quo, which the Attorney General urges this court to continue, includes, but is not limited to, state sponsored and officially sanctioned religious activity in the DeKalb County schools. Indeed, the Attorney General is not challenging the factual record or thirty years of controlling precedent. (Defs.' Reply at 2.) Nevertheless, by tying arguments urging preservation of the status quo because of what the Attorney General perceives to be an undue burden on free expression rights with analysis under *Hilton's* harm to the Defendants and public interest factors, the Attorney General essentially argues for preservation of majoritarian will. As the Attorney General should know, however, the will of the majority makes for sound argument in election disputes and political grandstanding; not in the analysis of First Amendment jurisprudence prohibiting officially sanctioned religious activities that violate the First Amendment.

At minimum, the status quo in DeKalb County violates the First Amendment's dictate that states "pursue a course of complete neutrality toward religion." *Jager v. Douglas County School Dist.*, 862 F.2d 824, 828 (11th Cir.

1989) (*citing Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).[12] Further, the status quo violates the interests of those counter-majoritarian citizens who choose to exercise religious beliefs, or who choose to not exercise religious beliefs, by forcing upon them, in an official setting, religious beliefs and practices that they may find unwelcome and that smack of state indorsement. The exercise of free expression rights do not justify violations of the Establishment Clause. *See, e.g., Bethel School District v. Fraser,* 478 U.S. 575 (1980); *Erznoznick v. City of Jacksonville,* 422 U.S. 205 (1975); *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974); *Tinker v. Des Moines Indep. Sch. Dist.,* 393 U.S. 503 (1969). Consequently, the court finds no merit in Defendants' argument that execution of the Permanent Injunction will result in the harm anticipated by the Defendants.

In addition, the court finds that absent execution of the Permanent Injunction, Plaintiffs will most surely suffer those harms that the Permanent Injunction specifically endeavors to prevent. Defendants will continue to violate Plaintiffs' rights, as evidenced by their unwillingness to comply with the court's Permanent Injunction, or, for that matter, with Supreme Court and Eleventh Circuit precedent detailing proscribed activity. Despite Defendants': (1) admission that they are "not challenging the court's March 12, 1997 Memorandum Opinion, the factual record in this matter, or thirty years of controlling precedent," (Defs.' Reply at 2); (2) admission that "educators within Alabama's public schools [do not] have the right to subject students to unwanted religious indoctrination," (Defs.' Reply at 7); and (3) recognition of the clear holding of the Eleventh Circuit in *Jager*, where, in the Attorney General's own words, "the court struck down a school district practice of authorizing and organizing invocations to be given prior to public high school football games," (Defs.' Reply at 9 (citing *Jager*, 862 F.2d 814 (11th Cir. 1989)), Defendants' actions indicate the contrary.

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[12] The Attorney General appears to recognize this established principle of First Amendment jurisprudence. (*See* Defs.' Mem. In Supp. at 21-22 n. 6.)

Two Declarations filed by the Plaintiffs on November 24, 1997,[13] to which the Defendants have notably failed to respond, allege that the following occurred at a November 7, 1997 Sylvania High School football game:[14]

> 1. At about 7:00 p.m., a voice came over the P.A. The voice said there was someone there who had a special message for us. A second voice told us that a recent ruling had banned prayer in school. He said that they wanted us to help them send a message to the federal government and the rest of the country. This voice also said that he had the full support of Fob James, the Governor of Alabama.

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[13] The Declaration of Susan Jane Neely was filed November 24, 1997. On the same date, Plaintiffs filed their "Supplemental Opposition To 'Defendants' Motion to Stay,' " which contained the hand-written statement of John Woodfin. Woodfin's typed and executed Declaration was filed December 5, 1997.

[14] Sylvania High School is one of the public schools located in DeKalb County, Alabama. The court's Permanent Injunction was issued October 29, 1997; the described activities occurred subsequent to, and in specific defiance of, the injunction.

> 2. All of the students were asked to go down to the football field, join hands, and form a circle. The stands cleared, as children from probably kindergarten up to twelfth grade made their way to the field. The circle stretched the width and length of the field, and consisted of students, band members, and cheerleaders. Then a man, middle-aged, wearing glasses, and on crutches because he only had one leg, walked to the middle of the circle. He told all of the children to get down on their knees and raise their hands to heaven. He told them to raise their hands up high because there might be someone there who needed to see this. Next, he said that they were going to pray to their god. There was a brief moment of silence, and then the man led these students in prayer, the Lord's Prayer.

(*See* Neely Decl. ¶¶ 1, 2; *see also* Woodfin Decl. (describing same activity).) In addition, Gary Carlyle, Principal of Sylvania High School, wrote letters to both the Montgomery Advertiser and the Birmingham News that, at best, evidence misunderstanding of the terms of the Permanent Injunction, and at worse, when read in conjunction with the activities described in the Neely and Woodfin Declarations, evidence deliberate defiance. (*See* Pls.' Supplemental Opp'n, Exs. A, A-1.)

Moreover, on November 4, 1997, the Governor of Alabama – a Party to this action – issued a Statement regarding the court's Permanent Injunction. In this Statement, the Governor asserted that the children of the nation's founders "had the benefit of prayer in school," and after reiterating his desire that this court decline to follow United States Supreme Court precedent and instead follow the Governor's interpretation of the

United States Constitution, stated: "I will resist Judge DeMent's order by every legal and political means with every ounce of strength I possess."[15] (*See* Pls.' November 6, 1997 Mot. To Enjoin Proceedings in the Etowah County Circuit Ct., Ex. B. (emphasis added).)

Based on these explicit and implicit indicia of noncompliance and purported and actual defiance of the law, as well as the myriad media reports that have been called to the court's attention, of which the court takes judicial notice, but on which the court does not rest its findings, it is clear that DeKalb County has allowed prayer at a high school football game in contravention of Jager and in specific defiance of the Permanent Injunction, and that the state chief-executive has promised political defiance.[16] It is clear that absent the Permanent Injunction remaining in effect, constitutional violations will continue, as indeed they have continued. Consequently, Plaintiffs have and will continue to suffer significant harms.

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[15] For an extensive overview of the Governor's unique interpretation of the United States Constitution and his misguided opinion as to why lower federal courts are not bound by Supreme Court precedent, see the thirty- four page June 1997 letter from Governor James to the court. In addition to the record, the text of the letter may be viewed, as of December 15, 1997, via the Internet at tp://alaweb.asc.edu/govoff.html. *See also* Fob James, Jr., DeMent Followed High Court Deceit, Birmingham News, December 7, 1997, at 1C.

It is indeed ironic, as Plaintiffs note, that Governor James "simultaneously contend[s] that the Court has no jurisdiction over the first amendment and then support[s] a stay of the Court's injunction on the ground that it infringes on students' first amendment rights. . . . " (Pls.' Reply at 21-22.)

[16] The court has no qualms regarding the Governor's promise of legal resistance to the court's Orders, and indeed encourages the pursuance of an appeal. Such is the proper procedure for addressing and resolving purported discrepancies in court orders.

Contrary to majoritarian wishes, the State of Alabama cannot establish an official religion, either explicitly or implicitly, and officially-sanctioned religious activity in public schools can and must be prohibited to protect the rights of all of the citizens of Alabama.[17] On balance, the court finds it more likely that Plaintiffs, and other citizens, will be substantially injured by a stay of the Permanent Injunction than that Defendants will suffer irreparable harm as a result of the enforcement of the Permanent Injunction. Accordingly, the court finds that *Hilton's* second and third factors cut against the Defendants and that *Hilton's* public interest factor favors denial of the Motion To Stay, as well.

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[17] The court suspects that if the Permanent Injunction enjoined non-majoritarian religious, or for that matter atheist or agnostic, beliefs and practices from being forced on schoolchildren in DeKalb county, certain state officials would be first in line to seek enforcement of the court's Permanent Injunction. Such religious prejudice is one of the reasons our forefathers left England for America, and one of the reasons the First Amendment prohibits state-established religion. (*See* November 1997 Supplemental Op. and Order at 60-61 n. 54); *see also Engle*, 370 U.S. at 432. "The right to be free from state-established religion lies at the heart of the concept of 'freedom of religion' embodied in the First Amendment." (November 1997 Supplemental Op. and Order at 61 n. 54 (citing *Lee*, 505 U.S. at 591).) "The individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority." *Wallace*, 472 U.S. at 60.

B. Interpretation Of The Permanent Injunction

The Defendants contend that the provisions of the Permanent Injunction at issue are "*facially* unconstitutional," (Defs.' Reply at 2 (emphasis in original)), and that "facial challenges to government enactments must be decided by reference to the contents of the restrictive language in question." (Defs.' Reply at 5.) Under the Attorney General's analysis, the court must look only to the language of the Permanent Injunction itself (on its face) in determining whether it passes constitutional muster or whether the provisions are vague and overbroad, as Defendants contend. (*See generally* Defs.' Reply at 2-6.) When so read, Defendants argue, "[t]hese provisions . . . are facially unconstitutional, without regard to this Court's previous Orders or the factual basis from which this case arose." (Defs.' Reply at 2 (emphasis in original).)[18]

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[18] Interestingly, the Attorney General also states that he "does not dispute Plaintiffs' contentions that the Permanent Injunction should be read in light of this Court's previous rulings." (Defs.' Reply at 3.) The Attorney General then takes the position that "the Permanent Injunction is inconsistent with this Court's previous rulings and controlling Supreme Court precedent. For these reasons, Defendants believe that this Court must stay those provisions of the Permanent Injunction which were specified in Defendants [sic] Motion for Partial Stay." (*Id.*) Although not clear, the Attorney General appears to be arguing that the challenged provisions of the Permanent Injunction are unconstitutional on their face, or, when read in conjunction with the court's previous Orders, are inconsistent with those Orders, and thus unconstitutional.

Plaintiffs counter that the Defendants not only ignore the plain language of the Permanent Injunction, (Pls.' Opp'n at 10), but that the correct " 'inquiry should be whether the parties subject to the injunction understood their obligations under the order.' " (Pls.' Opp'n at 6 (*quoting Combs v. Ryan's Coal Co.*, 785 F.2d 970, 978-79 (11th Cir. 1986), *cert. denied*, 479 U.S. 853 (1986)).) Plaintiffs urge a reading of the Permanent Injunction in context, and contend that when so read, the "proscriptions are all specific and under the totality of the circumstances give DeKalb County an extremely clear understanding of the conduct that is proscribed." (Pls.' Opp'n at 7.)

In contrast to Defendants' argument that only the face of the Permanent Injunction should be read in construing its terms, the Eleventh Circuit noted in *Combs* that:

> A court may also disregard [a] defect [in an injunction] if it is clear from the totality of the language in the various documents that [those enjoined] understood their obligations under the injunction. *United States v. Goehring*, 742 F.2d 1323, 1324 (11th Cir. 1984) (per curiam) (Rule 65(d) not specifically invoked, but contempt order upheld that incorporated earlier order because later order "contains sufficient findings of fact and conclusions of law for this court to perform its proper function and for the appellant to clearly understand the basis for the contempt order.")

Combs, 785 F.2d at 978 (emphasis added). *See also Lucero v. Chadwick*, 121 F.3d 191 (11th Cir. 1991) (*citing Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (interpreting injunction in light of the record before the court);

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (reviewing the facts in the record before the court in analyzing the remedial nature of an injunction). Notably, the Attorney General fails to address or apply these holdings. The court finds that when read in conjunction with the court's other Orders, or even when read facially, the Parties enjoined understand their obligations under the Permanent Injunction, and except as noted, infra, the provisions of the Permanent Injunction challenged by the Attorney General are constitutionally sound, are not vague and overbroad, and are in conformance with standing Supreme Court and Eleventh Circuit precedent.

In contrast to disagreeing about whether the Permanent Injunction, as a whole, should be read standing alone or in conjunction with other pleadings, the Parties agree that internally, "the Injunction must clearly and sufficiently delineate permissible and impermissible conduct." (Defs.' Reply at 9; Pls.' Opp'n at 6 ("The parties being enjoined have the right to know what activities are prohibited").) What is required is "the language of the injunction to be as specific as possible under the totality of the circumstances, such that a reasonable person could understand what conduct is proscribed." *United States v. Kaun*, 827 F.2d 1144, 1153 (7th Cir. 1987); *see also Howard Johnson Co., Inc. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990) (utilizing "reasonable person" standard in interpreting provision of a district court's permanent injunction and upholding finding of contempt); Fed.R.Civ.P. 65(d) (injunctions should "describe in reasonable detail . . . the act or acts sought to be restrained"); (Defs.'

Mem. In Supp. at 5 (citing to ***Connally v. General Const. Co.***, 269 U.S. 385, 391 (1926) for the correlative principle that "a statute is void if persons of common intelligence must necessarily guess at its meaning and differ as to its application") (emphasis added)). Rule 65 is not to be applied strictly; the inquiry is whether the "parties subject to the injunctive order understood their obligations under the order." *Williams v. City of Dothan, Ala.*, 818 F.2d 755, 761 (11th Cir. 1987) (citing *Combs*, 785 F.2d at 978-79).

The Attorney General asserts that "school administrators all across the state are questioning the meaning of this Court's Permanent Injunction." (Defs.' Reply at 3 n. 2.) This assertion is unsubstantiated by any supportive filings, and noticeably fails to address the question of whether the DeKalb County Board of Education and its individual members understand its/their obligations under the Permanent Injunction.[19] In contrast to the Attorney General's unsupported, self-serving assertion, the DeKalb County Board of Education ("School Board"), the entity for which the Attorney General purports to speak, has submitted its "Report to Court of Counsel of

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[19] It is indeed ironic that the Attorney General claims statewide mass confusion in one forum – this court, but then states that the Permanent Injunction applies only to DeKalb County in another – the media. (*See* Attachment B, December 8, 1997 Press Release from the Office Of The Attorney General ("AG December 8, 1997 Press Release") (stating that "many people in Alabama mistakenly believe the recent federal injunction strictly regulates religious expression in every school in the state, when in fact, these prohibitions only apply to the DeKalb County school system"); *see also*, Pls.' Add. Evid.)

DeKalb County Board of Education, et al." In that document, the School Board, individually and acting as a School Board, and the Superintendent, acting through counsel, delineated their efforts "to comply with all open orders of this court in good faith." (DeKalb Sch. Bd. Report To Ct. at 1.) Counsel for the School Board indicated that the following activities had been undertaken pursuant to the court's previous Orders and the court's Permanent Injunction:

> (1) A September 30, 1997 in-service for principals, assistant principals and certain administrative personnel of the DeKalb County School System. (*Id.*)
>
> (2) Distribution, at the September 30, 1997 in-service, of a memorandum, composed by School Board legal counsel, explaining the court's Orders and including a copy of the court's March 12, 1997 Memorandum Opinion and Order. (*Id.* at 2.)
>
> (3) The distribution of a memorandum concerning "Student Prayer en mass During Lunch" to all principals and other interested persons in the DeKalb County School System on October 2, 1997. (*Id.*)
>
> (4) The mailing of information to all principals, teachers and administrative personnel concerning questions involving religious activities in school on October 21, 1997. (*Id.*)
>
> (5) Submission of a memorandum concerning "Religion in Schools" on October 24, 1997. (*Id.*)
>
> (6) Distribution of documents entitled "Outline of Permanent Injunction of October 29, 1997, What the Board of Education Must Do,"

and "Outline of Permanent Injunction of October 29, 1997, What We Can and Can't Do" across the DeKalb County School System and to any interested citizen on October 29, 1997. (*Id.* at 5-6.)

(7) Distribution of a position paper or November 5, 1997. (*Id.* at 6.)

Additionally, the Report indicates that the School Board and the Superintendent have undertaken the following in compliance with the Permanent Injunction:

October 30 – Memo to Superintendent outlining proposed in-service for principals.

October 31 – Principal's in-service meeting. Copies of the following given to each principal:

Permanent Injunction

Timeline of Major Required Activities

Riley Letter

Outline of Permanent Injunction

Copy of Alabama Code 16-1-20.3

November 4 – Letter to Gideon's International with copy of Permanent Injunction attached.

November 4 – Memo outlining conversation with Mr. Jay Kaiman, Anti-defamation League.

November 6 – Memo to Superintendent outlining proposed meeting with local Gideons.

November 8 – Meeting with local Gideons. Copies of Permanent Injunction distributed.

November 10 – Notification of Permanent Injunction to all teachers.

November 10 – Meeting with Association Teacher Representatives, DeKalb County Education Association.

November 12 – Memo concerning proposed meeting with Assistant Principals.

November 14 – Memo outlining discussion points with Charles Haynes, First Amendment Center.

November 14 – Memo to all school [sic] asking for names and addresses of all PTO officers.

November 18 – Letter to Plaintiff's [sic] Attorney proposing candidates for monitor and copy of "Finding Common Ground" for preview.

November 24 – Fax communication from First Amendment Center.

November 25 – Board of Education approves policy "Distribution of Literature – Student Rights and Protection". [sic]

November 25 – Copy of proposed policy mailed to Plaintiff's [sic] Attorney.

(DeKalb Sch. Bd. Report To Ct. at 3-4.)[20]

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[20] The reporting Defendants further informed the court that "substantial pressure has been exerted toward persons attempting to comply with the orders of this court. The defendants have experienced great criticism regarding their position." (DeKalb Sch. Bd. Report To Ct. at 4.) In addition to copies of the distributed documents outlined above, copies of representative articles, editorials, and letters published since September 30, 1997 for and against the position of the reporting Defendants were attached. (*Id.*)

The court notes the difficult position in which some enjoined Defendants are placed by the provisions of the court's Permanent Injunction. Nevertheless, appointment or election to

To ensure that enjoined parties receive adequate notice of the precise conduct that is prohibited, Rule 65 requires that an injunction be specific in its terms and describe in reasonable detail the act or acts enjoined. Fed.R.Civ. p. 65(d); *Alabama Nursing Home Association v. Harris*, 617 F.2d 385 (5th Cir. 1980).[21] In reading the terms

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public office does not justify imposition of personal or political views contrary to established law. There is no doubt that some of the criticism is heightened by political agitation. But, the DeKalb School Board and its individual members would not have found themselves "experienc[ing] great criticism regarding their position" if they had complied with long-standing legal precedent from the beginning. While the court is sympathetic to Defendants' situation, it is, ultimately, one of their own making.

The court does, however, recognize and specifically command the School Board, its Superintendent, and their counsel for their good faith efforts to comply with the Orders of the court. Apart from the November 7, 1997 activities at a Sylvania High School football game, which greatly concern the court, and which should also greatly concern the School Board, a cursory review of the December 4, 1997 Report To Court, along with its attachments, evidence a concerted effort to not only rectify, but to educate, inform, and to obey the law, like it or not. As counsel for the School Board noted in an October 21, 1997 memorandum to DeKalb County School System principals, teachers, and administrative personnel addressing questions concerning religious activity in school: "The school prayer case is bleeding our educational system here in DeKalb County of financial resources we desperately need. Our teachers need to recognize this fact and govern themselves accordingly. . . . If you are not running for public office, or have some other hidden agenda, please become part of the solution and don't become part of the problem." (DeKalb Sch. Bd. Report To Ct., October 21, 1997 Mem. at 7-8 (emphasis added).)

[21] Decisions of the former Fifth Circuit rendered prior to October 1, 1981, constitute binding precedent in the Eleventh

of an injunction, the *Harris* court noted that "[a]n injunction does not prohibit those acts that are not within its terms as reasonably construed." Harris, 617 F.2d at 388. In *Schering Corp. v. Illinois Antibiotics Co.*, 62 F.3d 903 (7th Cir. 1995), *reh'g denied* (Sept. 12, 1995), the Seventh Circuit articulated why a reasonable construction is necessary: "[T]he rule of strict construction of injunctions should not be pressed to a dryly logical extreme. If narrow literalism is the rule of interpretation, injunctions will spring loopholes . . . and parties in whose favor injunctions run will be inundating courts with requests for modification in an effort to plug the loopholes." *Id.* at 906. Equally apparent is that unreasonable constructions and "narrow literalism" will lead to precisely the type of hypothetical "loopholes" offered by the Attorney General as examples of the Permanent Injunction's infirmity. The terms of the court's Permanent Injunction must be read reasonably, logically, and in their entirety; not in the selective splicing of words and phrases that inundate the Attorney General's Motion and Memorandum In Support thereof.[22] Following, is a

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Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[22] The Attorney General appears to recognize the basic maxim that particular words and phrases in any judicial order or legislative enactment should ordinarily be read logically and consistently with the other words and phrases in the same sentence, paragraph, and/or Order, as applicable. In Defendants' Reply, the Attorney General cites *United States v. Kaun*, 827 F.2d 1144 (7th Cir. 1987) "for the principle that the injunction should be viewed under a totality of circumstances through the eyes of a reasonable person." (Defs.' Reply at 4.)

Nevertheless, as Plaintiffs note, in challenging provisions of the Permanent Injunction as vague and overbroad, the Attorney General's "examples are themselves vague, being spectres restatement of the challenged provisions of the Permanent Injunction followed by a summarization of the Attorney General's objections. Except for the court's analysis under section 6(e), the court's analysis of the Attorney General's objections follow this restatement and summarization.

1. Section 6(a)

In its entirety, section 6(a) of the court's Permanent Injunction reads as follows:

> (a) Regarding Classroom Activities and Instructional Settings. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or permitting school organized or officially sanctioned religious activity in the classrooms of DeKalb County schools including, but not limited to: vocal prayer; Bible and religious devotional or scriptural readings; distribution of religious materials, texts, or announcements; and discussions of a devotional/inspirational nature, regardless of whether the activity is initiated, led by, or engaged in by students.
>
> This PERMANENT INJUNCTION DOES NOT proscribe the educational use of religious texts in the classroom to the extent that material

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intended to induce fear and horror, rather than concrete factual situations." (Pls.' Opp'n at 9.) Certainly the majority of the Attorney General's "narrow literalism" is not in keeping with Harris' admonition to reasonably construe the terms of an injunction or with the Attorney General's own reading of Kaun.

so used is presented in an objective and academic manner, for example, as part of a course of study.

This PERMANENT INJUNCTION DOES NOT proscribe students' voluntary expression of their own religious beliefs in the form of homework, reports, artwork, or other school assignments as applicable and as academically appropriate.

This PERMANENT INJUNCTION DOES NOT proscribe the display of religious symbols, articles and medals (for example, Crosses and Stars of David) and/or clothing bearing religious messages (provided that the school allows students to display non-religious expressive symbols and apparel and such display is in accordance with all applicable time, place, and manner restrictions).

This PERMANENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. Section 4071 et seq, or to quietly engage in religious activity during noninstructional times, so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves. This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place, and manner restrictions imposed on student distributions of nonreligious materials, subject to the provisions of paragraph 6(e) below.

(*See* Permanent Inj. at 3-4 (emphasis in original).) Not only a reasonable reading, but even a narrowly literal reading, discloses that what this provision prohibits is:

> (1) *School organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools including, but not limited to vocal prayer.
>
> (2) *School organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools including, but not limited to Bible and religious devotional or scriptural readings.
>
> (3) *School organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools including, but not limited to distribution of religious materials, texts, or announcements.
>
> (4) *School organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools including, but not limited to discussions of a devotional/inspirational nature, regardless of whether the activity is initiated, led by, or engaged in by students.

Clearly, this provision enjoins school organized, or officially sanctioned religious activity.[23] As other provisions of the Permanent Injunction clearly articulate,

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[23] The Attorney General admits that he is not challenging "*the Permanent Injunction's proscriptions with regard to school sponsored, officially organized religious activity,*" and that "[t]his law is settled." (Defs.' Reply at 10 (emphasis in original).) Nevertheless, the Attorney General then proceeds to challenge section 6(a), which a literal reading discloses merely enjoins "school organized or officially sanctioned religious activity." (Permanent Inj. At 3.)

students are free to engage in any or all of these activities as long as they are not school organized or officially sanctioned. For example, as the court took pains to note, the Permanent Injunction does not proscribe: (1) the educational use of religious texts in the classroom to the extent that the material is presented in an objective and academic manner; (2) students' voluntary expression of their own religious beliefs in the form of various school assignments as applicable and as academically appropriate; (3) the display of religious symbols or clothing bearing religious messages consistent with a school's applicable time, place and manner restrictions; (4) secondary-school students from engaging in religious activity during noninstructional time consistent with the Equal Access Act; (5) secondary-school students from "quietly engag[ing] in religious activity during noninstructional times, so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves" (Permanent Inj. at 4);[24] and (6) student distribution of religious materials to

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[24] The Attorney General particularly objects to the word "quietly" and the phrase "so long as it does not unduly call attention thereto" in one paragraph of section 6(a) as unduly vague and in violation of *Tinker v. Des Moines School District,* 393 U.S. 503 (1969). (Defs.' Mem. In Supp. at 8.) Specifically, Tinker provides that proscriptions be tailored to "the requirements of appropriate discipline in the operation of the school." *Id.* at 509.

In context, these words are part of section 6(a)'s proscription of school organized or officially sanctioned religious activity. They are stated in the fourth of four paragraphs detailing what the Permanent Injunction does not proscribe. They are part of the court's notation that "[t]his PERMANENT INJUNCTION DOES NOT affect the rights of classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on

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secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act . . . , or to quietly engage in religious activity during noninstructional times, so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves." (Permanent Inj. at 4 (italics in original) (underlining added).)

Consistent with *Tinker*, and with the court's emphasis on applying identical time, place, and manner restrictions to religious and other types of conduct, a more detailed enunciation perhaps could read: "This PERMANENT INJUNCTION does not affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act . . . , or to engage in religious activity during noninstructional times so long as it does not interfere with the rights of other students, is consistent with the school's applicable time, place, and manner restrictions regarding any other type of conduct during noninstructional times, and such policy is enforced consistently, regardless of the content of the conduct being proscribed."

The court finds that the words underlined above may not be sufficiently narrowly tailored, and thus finds that the Motion To Stay as to these twelve words of the court's three-thousand, seven-hundred and fourteen word Permanent Injunction is due to be granted. In staying the word "quietly," and the phrase "so long as it does not unduly call attention thereto and," however, the court notes that it is **merely clarifying what students have always been allowed to do consistent with the Permanent Injunction and established First Amendment law: engage in religious-activity that is not officially sanctioned or coerced and that does not** infringe on the rights of others. *See Tinker*, 393 U.S. at 513.

The Parties are put on notice, however, that inconsistent enforcement of school rules that work to favor religious conduct over other types of conduct may be construed as state promotion or indorsement of religion or a particular religion student distributions of nonreligious materials.[25] Not only a reasonable, but a literal reading of the terms of section 6(a) show a clear delineation between "*school organized* or *officially sanctioned* religious activity," (Permanent Inj. at 3), and non-school organized, non-officially sanctioned student conduct.

Nevertheless, the Attorney General contends that under his reading of section 6(a), the following could be prohibited:

> (1) Discussions in a history class dealing with the contributions of historical figures to modern day society. (Defs.' Mem. In Supp. at 5.)

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over other religions or non-religion. The First Amendment requires the government to remain strictly neutral among religions and between religion and non-religion. *Jager,* 864 F.2d at 828. Further, as the *Tinker* court noted: **"[C]onduct by the student, in class or out of class, which for any reason – whether it stems from time, place or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."** *Tinker,* 393 U.S. at 513 (emphasis added).

[25] Here, the Permanent Injunction refers readers to section 6(e), where the court requires DeKalb County to promulgate "a written policy of general application for all DeKalb County public schools . . . to govern such distributions in terms of time, place, and manner restrictions." (Permanent Inj. at 9.) In 6(e), the court reemphasizes that the Permanent Injunction "DOES NOT prohibit student distribution of religious materials to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distribution of nonreligious materials." (Permanent Inj. at 10.)

> (2) Discussions of the meaning or origin of certain state-recognized holidays. (*Id.* at 1, 6.)
>
> (3) Bible reading and discussion among students in a study hall or homeroom period, even if not disruptive of the classroom setting. (*Id.*; Defs.' Reply at 11.)
>
> (4) Student-initiated Bible club meetings on campus after school hours. (*Id.* at 7.)
>
> (5) Students praying before lunch. (Defs.' Reply at 12.)
>
> (6) A student giving a flyer to another student about an event at his church or youth group.

2. Section 6(b)

In its entirety, section 6(b) of the court's Permanent Injunction reads as follows:

> (b) Regarding Graduation or Commencement Exercises. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, participating in, or permitting, prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises, regardless of whether such prayer, invocation, benediction, or devotional message is offered by clergy, a student, administrator, teacher, school employee, or nonschool person, regardless of how such prayer, invocation, benediction, or devotional message is denominated, and regardless of whether a public-address system is used. The Defendants, and each of them, are specifically PERMANENTLY ENJOINED from permitting such

activity at commencement or graduation exercises in the guise of valedictory, salutatory, historian, or similar student addresses and remarks.

This PERMANENT INJUNCTION DOES NOT proscribe a brief personal expression by a student which contains religious references during a commencement exercise or student address (for example, a student may express thanks to Deity for his or her academic success),[26] provided that such expression is not encouraged in any way by school officials and does not invite audience participation or response (for example, a student speaker may not invite the audience to participate with him or her in prayer or urge the audience to take a moment with him or her to thank Deity). Where enjoined activity by students occurs, it is CONSIDERED that school officials be and they are hereby ORDERED to take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of the violative conduct as it occurs and to deter similar conduct in the future.

The Defendants, and each of them, are further PERMANENTLY ENJOINED from listing, announcing, or memorializing any religious

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[26] This is but one example of a brief permissible reference by a student to Deity or religion. This example is not meant by the court to suggest any form of expression to any student or to suggest that this is the only such reference that would be permissible. It is intended to be illustrative only, and to assist school officials in complying with the terms of this PERMANENT INJUNCTION. (Permanent Injunction at 5, n. 1.)

> activity or message on any commencement program at any DeKalb County school. The Defendants, and each of them, are specifically PERMANENTLY ENJOINED from printing baccalaureate announcements or commemorations or other materials regarding baccalaureate services on the commencement programs of DeKalb County public schools and from organizing or sponsoring any baccalaureate event (although they may attend). School officials are prohibited from encouraging or discouraging, directly, or indirectly, a student's attendance at baccalaureate services. Specifically, school officials may not condition a student's attendance at commencement exercises on attendance at baccalaureate events.

(*See* Permanent Inj. at 4-6 (emphasis in original).) Prohibited under section 6(b) are:

> (1) Prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises.
>
> (2) Such activity in the guise of valedictory, salutatory, historian, or similar student addresses and remarks.
>
> (3) The listing, announcing, or memorializing of any religious activity or message on any commencement program at any DeKalb County school.
>
> (4) The printing of baccalaureate announcements or commemorations or other materials regarding baccalaureate services on the commencement programs of DeKalb County public schools.

> (5) The organization or sponsorship of any baccalaureate event by school officials.
>
> (6) School officials encouraging or discouraging, directly or indirectly, a student's attendance at baccalaureate services.
>
> (7) School officials conditioning a student's attendance at commencement exercises on attendance at baccalaureate events.

Prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises are prohibited regardless of whether offered by clergy, a student, administrator, teacher, school employee, or non-school person, regardless of how denominated, and regardless of whether a public-address system is used. When violations occur, school officials are directed to take "appropriate disciplinary action as they would for any violation of school disciplinary rules." (Permanent Inj. at 6.)

Again, the court took pains to note what section 6(b) does not proscribe:

> (1) A brief personal expression by a student which contains religious references during a commencement exercise or a student address that is not encouraged by school officials and that does not invite audience participation or response.[27]

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[27] The court specifically noted that a student may express thanks to Deity for academic success and emphasized that the court was not suggesting that this was the only such reference that would be permissible. The court's example was meant to be "illustrative only," and articulated to "assist school officials in

The Attorney General contends that section 6(b) is vague, (Defs.' Mem. In Supp. at 9; Defs.' Reply at 12), and under his reading of section 6(b), a student valedictorian could be prohibited from explaining why Mother Teresa was an inspiration for his or her success. (Defs.' Reply at 12.) The Attorney General also contends that when he reads section 6(b) literally, it: (1) could require the school to "police all in attendance" (Defs.' Mem. In Supp. at 9); (2) discriminates against private religious speech based on its content and viewpoint (*Id.* at 9-11); (3) would lead to school officials censoring a student graduation speaker's thoughts before a speech was given (Defs.' Mem. In Supp. at 2); (4) violates the Establishment Clause by requiring state entanglement with religion (*Id.* at 11-12); and (5) violates Supreme Court and Eleventh Circuit precedent. (*Id.* at 12-14.)

3. Section 6(c)

In its entirety, section 6(c) of the court's Permanent Injunction reads as follows:

> (c) Regarding Use of Public-Address Systems for Religious Addresses. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting commanding, counseling, inducing, ordering, procuring, participating in,

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complying with the terms of this PERMANENT INJUNCTION." (Permanent Inj. at 5 n. 1 (emphasis in original).)

The court also explained that the permissible "personal expression by a student . . . may not invite the audience to participate with him or her in prayer or urge the audience to take a moment with him or her to thank Deity." (Permanent Inj. at 5-6.)

> or permitting, students, school employees, school officials, clergy, and nonschool persons to pray or to deliver religious or devotional messages (including scriptural readings) over any public-address system during the instructional day (including the home room period) or in connection with any school-sponsored event, including, but not limited to, assemblies and sporting events. This provision includes the delivery of daily announcements. No exception to this provision shall be permitted during times of perceived crisis or exigent circumstances. Where enjoined activity by students occurs, it is CONSIDERED that school officials be and they are hereby ORDERED to take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of such violative conduct as it occurs and to deter similar conduct in the future.
>
> This PERMANENT INJUNCTION DOES NOT prohibit students from making announcements over the school public-address system regarding meetings of noncurricular religious clubs, provided that the announcements themselves do not contain a prayer or devotional, and provided that any such announcements are subject to the same time, place, and manner restrictions that apply to announcements of nonreligious activities.

(Permanent Inj. at 6-7 (emphasis in original).) Activity prohibited under section 6(c) include:

> (1) The delivery of prayers, religious or devotional messages (including scriptural readings) over any public-address system during the instructional day, including: the home room

> period, the delivery of daily announcements, and in connection with any school-sponsored events.

When violations by students occur, school officials are directed to "take appropriate disciplinary action as they would for any violation of school disciplinary rules." (Permanent Inj. at 7.)

The court specifically noted that students could make announcements over a school public-address system "regarding meetings of noncurricular religious clubs, provided that the announcements themselves do not contain a prayer or devotional, and provided that any such announcements are subject to the same time, place, and manner restrictions that apply to announcements of non-religious activities." (Permanent Inj. at 7.)

The Attorney General contends that 6(c)'s restrictions regarding the use of school public address systems for religious addresses are unconstitutional because they are vague and overbroad. (Defs.' Mem. In Supp. at 14-15.) Under his reading of this provision: (1) "Muhammad Ali would not be able to address the student body and share his life's [sic] story;" and (2) "school officials would be required to censor all student speeches which occur as part of any school assembly." (Defs.' Mem. In Supp. at 2.)

4. Section 6(d)

In its entirety, section 6(d) of the court's Permanent Injunction reads as follows:

> (d) Regarding School-Sponsored Assemblies and Events. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding,

> abetting, commanding, counseling, inducing, ordering, procuring, or otherwise participating in, or permitting, prayers, Biblical and scriptural readings, and other presentations or activities of a religious nature, at all school-sponsored or school-initiated assemblies and events (including, but not limited to, sporting events), regardless of whether the activity takes place during instructional time, regardless of whether attendance is compulsory or noncompulsory, and regardless of whether the speaker/presenter is a student, school official, or nonschool person.
>
> This PERMANENT INJUNCTION DOES NOT prevent secondary-school students from engaging in religious expression and activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. Section 4071 et seq, which, while according students expressive rights, does not allow school officials to provide special privileges to noncurricular student religious clubs in terms of meetings and assemblies that they do not provide to other student clubs.

(Permanent Inj. at 7-8 (emphasis in original).) Section 6(d) prohibits:

> (1) Prayers, Biblical and scriptural readings, and other presentations or activities of a religious nature, at all *school-sponsored* or *school-initiated* assemblies and events, regardless of whether the activity takes place during instructional time, whether attendance is compulsory or noncompulsory, and regardless of the speaker.

The court noted that the Permanent Injunction did not interfere with the Equal Access Act, and specifically noted that the Act accords students expressive rights but "does not allow officials to provide special privileges to noncurricular student religious clubs in terms of meetings and assemblies that they do no provide to other student clubs." (Permanent Inj. at 8.)

Section 6(d) is challenged because the Attorney General reads its provisions to be "grossly overbroad" and "literally would prevent: (1) a parent from praying silently in the stands at a football game" (Defs.' Reply at 13); (2) "a group of football players gathering together before a school game to pray" (Defs.' Mem. In Supp. at 15-16); (3) "a football player who scores a touchdown during a game from kneeling down in the endzone to pray" (*Id.* at 16); and (4) the singing of "Silent Night" and other songs at a school Christmas play or concert. (*Id.*)[28]

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[28] After a detailed search of the Permanent Injunction, the March 1997 Memorandum Opinion and Order, the November 1997 Memorandum Opinion and Order, and the November 1997 Supplemental Opinion and Order, the court can find no reference to a ban on the singing of "Silent Night" or other songs at a school Christmas play or concert. Any school sponsored or officially sanctioned activity must simply comport with standing Supreme Court and Eleventh Circuit law, as well as the terms of the court's Permanent Injunction. Clearly read, section 6(d) prohibits such activities that are primarily of a "religious nature." As section 6(a) notes, the expression of religious material in an objective, academically appropriate manner is clearly permissible. And, as section 6(c) notes, "religious or devotional" messages may not be delivered over a public address system during the instructional day. Section 6(d) merely proscribes the delivery of such officially sanctioned, content-focused messages in school-sponsored assemblies and events.

5. Section 6(e)

In its entirety, section 6(e) of the court's Permanent Injunction reads as follows:

> (e) Regarding Distribution of Bibles and Other Religious Tracts. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise permitting, school officials or nonschool persons to enter any classroom or any school property where students are assembled, for the purpose of distributing Gideon Bibles or other religious tracts, literature, or paraphernalia to students on school property during the school day, including the home room period and any period during which students are required to be present in school, or at any school-sponsored event.
>
> No distribution of Gideon Bibles or other religious tracts, literature, or paraphernalia by placement of them in a common area shall occur in the absence of a formal, written policy adopted by the DeKalb County Board of Education governing distribution of materials from nonschool persons in DeKalb County public schools generally.
>
> It is further CONSIDERED that Defendants be and the same are hereby ORDERED that within thirty (30) days of the date of this PERMANENT INJUNCTION, Defendants shall promulgate a written policy of general application for all DeKalb County public schools, binding upon all school principals, teachers, and other school employees uniformly in each public school in DeKalb County, to govern such distributions in terms of time, place, and manner

restrictions; and Defendants shall serve a copy of the same upon Plaintiffs' counsel, who, within ten (10) days, shall list any objections, and shall submit the same to this court for its rejection or concurrence. Following court approval, the Defendants shall publish and shall distribute to each school principal a copy of the written policy, with instructions that it shall be followed in each DeKalb County public school.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to provide immediately to the Gideons International representatives who are known by them to have visited DeKalb County schools, or to their designated organizational representative, a copy of this PERMANENT INJUNCTION.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to inform the organization in writing, immediately, that students shall not be harassed with regard to acceptance or nonacceptance of any Gideon Bibles that may occur while its representatives are situated on public property near the school, (such as the public sidewalk), if students who are approached for distribution are still situated on or boarding school property, and that they shall not throw or pass Gideon Bibles through the windows or doors of DeKalb County school buses or otherwise act in an aggressive manner toward students with regard to any distribution of Gideon Bibles while those students are still situated on school property (for example, standing in line in the school parking lot to board the bus and still under school officials' general supervision and protection, or boarding the public school bus).

> It is further CONSIDERED that Defendants be and the same are hereby ORDERED to send a copy of this written notification to Plaintiffs' counsel and to file a copy with the court.
>
> It is further CONSIDERED that Defendants be and the same are hereby ORDERED to follow the exact steps enumerated herein for any non-school group or person other than the Gideons International that wishes to have access to students for the purpose of distributing Bibles, religious tracts, religious literature, or religious paraphernalia.
>
> In the event of a violation of this PERMANENT INJUNCTION, and in the event of aggressive or harassing behavior of the sort proscribed herein, school officials shall take action to cause the violative conduct to cease immediately.
>
> This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distributions of nonreligious materials.

(Permanent Inj. at 8-11 (emphasis in original).)

The Attorney General challenges section 6(e), contending that it "violates the Gideon's right to distribute religious literature in a traditional public forum without a compelling state interest." (Defs.' Mem. In Supp. at 17; *see also* Defs.' Reply at 16-21.) Plaintiffs contend that the Attorney General does not have standing "to challenge the alleged chilling of the Gideons' alleged free-speech rights." (Pls.' Opp'n at 30.) This, Plaintiffs argue, "is the Gideons' burden." (*Id.*) The Attorney General counters that he does have standing because: (1) "the Attorney General has both a legal right and an obligation to defend the constitutional rights of the citizens of Alabama" (Defs.' Reply at 14); (2) "the Attorney General has sworn, under oath, to abide by the laws of the State of Alabama and the United States, and at all times to secure their enforcement" (*Id.* at 15); (3) as "a named party to this lawsuit . . . the Attorney General has every right to raise vagueness/overbreadth issues which arise in the course of this litigation" (*Id.*); and (4) the Attorney General represents the State and DeKalb County Boards of Education, the Permanent Injunction requires these Parties to take steps which the Attorney General contends "will chill the free speech rights of a party," and "[c]onsequently, the Attorney General has standing, on behalf of his clients, and himself individually, to raise the Gideon's free speech rights." (*Id.*)

Although the court has doubts regarding the Attorney General's ability to speak for the Gideons, *see Lucero,* 121 F.3d at 605 n. 25 (quoting *Madsen,* 512 U.S. at 775-77 ("[Defendants] themselves are named parties in the order, and they therefore lack standing to challenge a portion of the order applying to persons who are not parties")), regardless of the standing issue, a reasonable and literal reading clearly shows that section 6(e) merely prohibits:

> (1) School officials or nonschool persons from entering any school property where students are assembled, for the purpose of distributing Gideon Bibles or other religious tracts, literature, or paraphernalia to students on school property during the school day or at any school sponsored event.

> (2) The distribution of Gideon Bibles, religious tracts, literature, or paraphernalia by placement in a common area absent a "formal, written policy . . . governing distribution of materials from nonschool persons in DeKalb County public schools generally." (Permanent Inj. at 8-9 (emphasis added).)

As noted above, section 6(e) specifically emphasizes that the Permanent Injunction "DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distributions of nonreligious materials." (Permanent Inj. at 11 (emphasis in original).) In its November 1997 Supplemental Opinion and Order, the court also stated that:

> The court does not wish by the terms of its injunction to discriminate against the Gideons International. The court does not intend by its injunction to single out the Gideons for discriminatory treatment or to infringe upon their free-speech rights. By the same token, the court is disturbed by the absence of uniform regulation by school officials and the 'gap' this leaves in the delicate area of the interplay between the rights of nonschool persons and students. It is for this reason that the court's injunction makes reference to the location of students. The court takes it as a simple truism that, where the public schools are concerned, adult nonschool persons cannot harass or act aggressively toward students in regard to distributing any materials, religious or otherwise. Such conduct would not be reasonable in time, place and manner.

(November 1997 Supp. Op. And Order at 51-52.)

Section 6(e) also requires the following:

(1) A promulgated, written policy applicable in all DeKalb County public schools governing distributions in terms of time, place, and manner restrictions.

(2) Publication and distribution of a written copy of such policy with instructions that it shall be followed to each school principal, with instructions that it shall be followed in each DeKalb County public school.

(3) That a copy of the Permanent Injunction be provided to the Gideons.

(4) That the Gideons be informed in writing "that students shall not be harassed with regard to acceptance or nonacceptance of any Gideon Bibles that may occur while its representatives are situated on public property near the school . . . if students who are approached for distribution are still situated on or boarding school property. . . . " (Permanent Inj. at 10 (emphasis in original).)

(5) That the Gideons be informed additionally, that "they shall not throw or pass Gideon Bibles through the windows or doors of DeKalb County school buses or otherwise act in an aggressive manner toward students with regard to any distribution of Gideon Bibles while those students are still situated on school property. . . . " (Permanent Inj. at 10.)[29]

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[29] The court specifically noted that "still situated on school property" meant, for example, while students were . . . "standing in line in the school parking lot to board the bus and still under school officials' general supervision and

> (6) That the same steps be followed "for any nonschool group or person other than the Gideons International that wishes to have access to students for the purpose of distributing Bibles, religious tracts, religious literature, or religious paraphernalia." (*Id.*)
>
> (7) That school officials "take action to cause . . . violative conduct to cease immediately" in the event of violations of the injunction and in the event of "aggressive or harassing behavior of the sort proscribed herein." (*Id.*)

Regardless of the standing issue, on November 18, 1997, the Superintendent of Education for the DeKalb County Board of Education provided to the court a copy of a November 4, 1997 correspondence sent to the Gideons International. The Superintendent informed the court that, in addition to sending such correspondence to the Gideons International, he had met with local leaders of the Gideons International "to present the injunction and answer questions." (November 18, 1997 Correspondence from Superintendent of Educ. to the court, Attachment A.)[30] On November 25, 1997, Plaintiffs filed a pleading indicating the DeKalb County Board of Education's compliance with section 6(e). The substance of the correspondence from the DeKalb County Board of Education to the Gideons International reads as follows:

> Please find attached to this letter a copy of a permanent injunction issued by Judge Ira

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protection, or boarding the public school bus." (Permanent Inj. at 10.)

[30] This information was also reported in the DeKalb School Board's December 4, 1997 Report To Court.

> DeMent of the United States District Court for the Middle District of Alabama, Northern Division.
>
> Judge DeMent has ordered that you be provided with a copy of this injunction and that you be informed that students shall not be harassed with regard to acceptance or nonacceptance of any Gideon Bibles while Gideon representatives are situated on public property near the school, and that Gideons shall not throw or pass Gideon Bibles through the windows or doors of school buses or otherwise act in an aggressive manner toward students with regard to any distribution of Gideon Bibles while those students are still situated on school property.

(*See* November 4, 1997 Correspondence from DeKalb County Bd. of Educ. Superintendent of Educ. to the Gideons International, Pls.' Notice of Compliance, Ex. A.)

Further, on December 2, 1997, Plaintiffs filed their "Notice Of No Objection To DeKalb County Board Of Education's Policy Regarding Distribution Of Materials By Nonschool Persons." ("Pls.' Notice of No Objection"). Plaintiffs state that "they have confirmed in a conversation with DeKalb County counsel that the policy proposed . . . as to distribution of nonschool materials was in fact adopted by the DeKalb County Board of Education last week." The policy reads as follows:

> **Distribution of Literature**
> **Student Rights and Protection**
>
> The DeKalb County School Board of Education recognizes the right of students to distribute literature on public school property, subject to reasonable time, place and manner restrictions imposed by the school. Such restrictions

> should be reasonable and must apply evenly to all nonschool student distributed literature.
>
> DeKalb County schools may prohibit the distribution of literature that is obscene, defamatory, or disruptive of the educational environment.
>
> The DeKalb County Board of Education prohibits the distribution by DeKalb County school board employees and nonschool individuals of commercial, political, religious or promotional materials to students on public school property.

(Pls.' Notice of No objection, Ex. A, proposed policy for literature distribution.)

Clearly, the DeKalb County Board of Education understood its obligations under section 6(e) of the Permanent Injunction. Not only did DeKalb County comply with those provisions addressing the Gideons International, it also complied with those provisions requiring the promulgation of a written policy governing the distribution of materials in DeKalb County schools. In correspondence dated November 25, 1997, the Superintendent of Education for DeKalb County stated that "[o]n Page 9 of the Permanent Injunction, provisions are made for a review and the listing of any objection within ten days. I will wait for Court approval, and possible revision, before officially implementing this policy in DeKalb County Schools." (*Id.*) Based on the foregoing, the court finds that, without addressing the propriety of section 6(e), the substantive provisions therein have been substantially complied with, and any objections relating thereto are accordingly moot.

6. Section 7

In essence, section 7 of the Permanent Injunction requires the following:

> (1) The distribution of the court's opinions and Permanent Injunction to school principals in DeKalb County with instructions that each principal inform faculty, staff and students that the court requires compliance. (Permanent Inj. at 12.)
>
> (2) That in each DeKalb County public school, a copy of the Permanent Injunction be made available or posted in areas commonly utilized for communicating notices or information to both students and faculty until the Permanent Injunction expires. (*Id.*)
>
> (3) That a copy of "The Riley Letter" and a copy of the monograph entitled "Religion in the Public Schools: A Joint Statement of Current Law" remain available in each DeKalb County public school library until expiration of the Permanent Injunction. (*Id.*)
>
> (4) That copies of the court's opinions and Permanent Injunction, together with a notice specifically articulated in the Permanent Injunction, be provided to groups organized for parental participation in school affairs at each DeKalb County public school. (*Id.* at 12-13.)
>
> (5) That during the 1997-98 school year, Defendants conduct an in-service training session for faculty and administrators in DeKalb County public schools that is "reasonably designed to familiarize these school officials with the provisions of this Permanent Injunction, the general

contours of Establishment Clause and Free Exercise principles as the court has explained them in its opinions in this case, their rights and duties in connection with the controlling law of church and state relations in the public-school setting, and the general issue of school officials' tolerance for diversity in religious opinion and duty of neutrality in matters of religion when acting in their official capacities." (*Id.* at 13.)

(6) That Defendants direct all new faculty and administrators not present for the 1997-98 in-service training to acknowledge in writing that they have read the curricular/teaching materials used at the 1997-98 in-service session. (*Id.*)

(7) That the curricular material used for the in-service be the court's opinions in this matter, together with a "program of religiously neutral, nonsectarian content selected by the DeKalb County School Board and submitted to the court-appointed monitor [for approval], with a copy served on Plaintiffs' counsel for the purpose of tendering specific written objections. . . . " (*Id.* at 13-14.)

(8) That counsel for the School Board certify to the court on pre-determined dates each year, "that each school within the DeKalb County school system is in compliance with this Permanent Injunction." (*Id.* at 14.)

(9) That in conjunction with Plaintiffs' counsel, a monitor be nominated for the purpose of insuring compliance with the Permanent Injunction. (*Id.* at 15-16.)

(10) That the in-service session and monitor be paid for by the DeKalb County Board of Education. (*Id.* at 16.)

These enforcement provisions are challenged "[t]o the extent that section 7 requires school officials to enforce certain provisions of section 6." (Defs.' Mem. in Supp. at 22.) Section 7(e) is specifically challenged as vague because, according to the Attorney General, directing school officials to use a "program of religiously neutral, nonsectarian content," is not sufficiently clear. (*Id.*) Nevertheless, contrary to the Attorney General's purported failure to understand the requirements of section 7, the DeKalb County Board of Education and its members have made it patently clear that they understand the Permanent Injunction's requirements.

In addition to the Report to the court, (examined supra), on December 2, 1997, Plaintiffs filed a pleading entitled "Notice Of Agreement With DeKalb County Board Of Education's Nominee As Monitor, Notice Of Agreement With DeKalb County Board Of Education's Selection Of Course Materials, And Notice Of No Objection To DeKalb County Board Of Education's Policy Regarding Distribution Of Materials By Nonschool Persons." These pleadings illustrate to the court the DeKalb School Board ability to understand the terms of the Permanent Injunction. The court finds the Attorney General's assertion that the School Board does not understand its obligations under the Permanent Injunction curious, especially in light of the DeKalb School Board's filings. The Attorney General would be well advised to communicate more fully with his purported client(s) before making assertions on its behalf.

7. Refutation of the Attorney General's Hypotheticals

The Attorney General's selective interpretation of the words and phrases in the challenged provisions of the court's Permanent Injunction is a prime example of what Plaintiffs contend to be the injection of "political divisiveness into these proceedings," (Pls.' Opp'n at 4 n. 8), and one of the "spectres intended to induce fear and horror" into the populace. (Pls.' Opp'n at 9.) The court has made patently clear in its Permanent Injunction, read reasonably and without "narrow literalism," and for that matter, in its other Orders, of which the Attorney General should have received copies, exactly what type of conduct is proscribed. The court has also taken pains to note what is permissible under current Supreme Court and Eleventh Circuit precedent. Although clear under a reasonable and logical reading, the Attorney General has adduced hypothetical situations as a means of challenging the Permanent Injunction. In their Opposition to Defendants' Motion To Stay, Plaintiffs responded factually, legally, and with specificity, to the Attorney General's hypotheticals. The court hereby adopts the pertinent provisions of Plaintiffs' pleading presented below:

> Only by ignoring the plain language of the injunction, the teachings of this Court's March 12 opinion, and the facts as presented by the parties and found by the Court can one reach such astounding conclusions. And, only by ignoring 30-odd years of precedent can one reach the conclusion that the Attorney General is likely to succeed on appeal. As this Court pointedly noted in its November 12, 1997 Supplemental Opinion and Order, "[t]his federal

district court does not judge it to be its province to adopt for Alabama" the case law of the Fifth Circuit, in the face of *Lee v. Weisman* and *Jager,* to name but two controlling cases. (*See* Supp.Op. at 42, Ex. A hereto.) Thus, the defendants' likelihood of success on appeal only exists if the Eleventh Circuit overrules *Jager,* a matter which this Court cannot prognosticate and which matter will shortly be in the hands of the only court that can preliminarily overrule or ignore it. *Jager* is now the law, and under *Jager,* the defendants have no substantial likelihood of prevailing on appeal.

. . .

1. Students can read their Bibles during study hall[31]

The objection to the injunction as "vague" and "overbroad" purports to find that under these amorphous provisions, a student cannot read the Bible in study hall.

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[31] There might indeed be a situation in which a student is prohibited from reading his or her Bible during study hall, but only if that activity is "school organized" or "officially sanctioned." An individual student reading his or her Bible in study hall, without direction to do so from the teacher or a school official, is not encompassed in the terms of the injunction. Nor, by the plain terms of the injunction, is a school official proscribed from instructing a student in, *e.g.*, a Bible as Literature class to do his or her homework, including assigned reading from the Bible. Finally, of course, the entire injunction must be read in context, not dissected to fit the Attorney General's purposes in one narrow phrase. Section 6(d) makes it clear that the Court does not contemplate enjoining the student sitting in study hall; it expressly refers to a "speaker/presenter." A "speaker/presenter" is not a student quietly reading the Bible in study hall, as common sense informs us.

As the Court was at pains to make clear in its March 1997 Memorandum Opinion, a copy of which was attached to the injunction, the Establishment Clause does not reach private student expression and activity. In its injunction, the Court similarly made it clear that only "school organized" or "officially sanctioned" religious activity falls within the scope of its prohibition.[32] What is "school organized" or "officially sanctioned" religious activity? According to the Court:

> [W]hen a student advocates his or her religious beliefs in situations where the student's peers are unable to move about freely (and thereby avoid listening to speech they find disagreeable) and/or when the student's peers are unable to freely express themselves in response (because school officials are actively controlling a particular setting).[33]
>
> The Court would distinguish the above-described situations from those periods during which students are "in school" or attending a school-event but school officials exercise minimal supervisory control and students are free to move about as they please. During these latter times, e.g., in between classes or lunch (depending on the factual circumstances) the restrictions on students' free speech rights are limited; students should be able to engage in sectarian,

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[32] In fact, the Court even emphasized, through the use of italics, that the phrase "religious activity" is to be modified by the phrases "school organized" and "officially sanctioned." (Injunction at 3.)

[33] "Self-evidently, a student privately reading a Bible in study hall does not necessitate a "response" from anyone.

proselytizing, religious speech as long as it is not, for reasons other than its content, disruptive (e.g., it is loud, the speaker is aggressive etc.).

And, the Court clarified, "As long as students abide by a school's generally applicable rules and regulations, students should ordinarily" be permitted to engage in a wide variety of religious expression. The Court went on to provide an "exemplary" list only, one that was "by no means intended to be a complete statement of permssible [sic] religious expression by public school students." (Mem. op. at 22-23 & nn. 16, 17.)

When the speaking student's use of the school's facilities includes commandeering a captive audience or a school setting in which the speaker's schoolmates are unable to respond in kind, speech is "officially sanctioned" because the speaker is then using the machinery of the state for conveying the religious message to the captive audience. Thus, a student who obtains the permission of the school official who is monitoring the study hall and then leads his fellow study hall participants in a public Bible reading and prayer from which the dissenting students could not leave is on different constitutional ground than a student who whiles away the hour by silently reading Proverbs, instead of Sassy magazine, after completing his or her math assignment. The latter is engaging in that type of private religious activity which falls outside the reach of the Establishment Clause, while the former is not. The latter's conduct is not touched by the injunction, while the former's is prohibited.

This portion of the injunction is in keeping with the requirements of the First Amendment. Public school officials are prohibited by the Establishment Clause of the First Amendment to the United States Constitution from authorizing anyone – including students – to insert religious exercises into a school program. *Lee v. Weisman*, 505 U.S. 577 (1992); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Jager v. Douglas County Board of Education*, 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd per curiam*, 455 U.S. 913 (1982). This law is nothing new, and it militates against granting a stay.

2. Students are permitted to discuss the meaning of Christmas and Easter

As already noted, the Court's order reaches only "school organized" or "school sponsored" religious activity, so a student's discussions with his or her friends over lunch or on the playground are not affected in any way by the injunction. As for in-classroom activity, the Court has made provision for those students who might wish to give a speech or presentation that includes their personal religious beliefs, including the meaning of Christmas. In paragraph 6(a), the Court states: "This PERMANENT INJUNCTION DOES NOT proscribe students' voluntary expression of their own religious beliefs in the form of homework or artwork or other school assignments as applicable. . . . " (Injunction at 4 (emphasis in original).) This certainly includes a discussion of

"What Christmas means to me" or "The true meaning of Easter" offered in connection with a school assignment (such as an essay or a speech). A student may choose in such an academic context to proffer ideas expressive of his or her own religious beliefs, consistent with *Schempp* and with this Court's injunction.

Likewise, contrary to the Attorney General's hyperbolic fulminations, the injunction does not prohibit a history student's in-class remarks about "why Jesus contributed more than Einstein or Edison." (Mot. Partial Stay at 5.) Assuming that such a remark is an expression of religious belief,[34] such remarks clearly fall within the above-articulated exception – the "voluntary expression of [students'] own religious beliefs in the form of . . . school assigments." (Injunction at 4.)[35] If a teacher directs students to discuss the importance of various historical figures, a student's voluntary discussion of the importance of Jesus fulfills the terms of the assignment. This does not violate the terms of the injunction, does not violate the Constitution, and is not a reason to grant the motion to stay.

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[34] It might be or it might not be. It is certainly possible that a student could believe that Jesus Christ is an important historical figure without believing that he is the Son of God, and presumably a great many Jewish believers, Muslims, Buddhists and agnostics could believe this. It could be, for example, that a Muslim student or even an atheist student could believe that Jesus was a great teacher without believing in or expressing a belief in Jesus' divinity. It could be that a person of any religion or no religion could forcibly argue in the context of an academic assignment that measuring a calendar from the date of a crucifixion is *prima facie* evidence that the historical importance of Jesus outweighs that of the inventor of incandescent lighting. This speech would not necessarily be religious, and even if it were, it is not proscribed. The matter is neither here nor there, except to the extent it is in the Attorney General's head and his brief.

[35] Also, to the extent that "educational texts" were involved in this hypothetical history class, those texts can be

3. Students can pray before lunch

The injunction does not reach private expressions of a student's faith, such as saying grace before meals. One particular pre-lunch "religious" behavior is prohibited: the "religiously based" harassment of Plaintiff Jesse Chandler by his fellow students at Fyffe School. (Injunction at 11.) According to the uncontroverted testimony of Michael Chandler in this case:

> Fyffe School students are led to lunch every day and cannot leave the campus for lunch; the school has a closed-campus policy. In approximately October 1996, Jesse[36] began experiencing harassment in the lunchroom. I am aware that the agreement signed by my lawyer and DeKalb's lawyers states that school officials will intercede to stop harassment based on religious belief. Virtually every day between October 1996

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specifically religious, as long as the books or documents are part of an objective or academic course of study. (Injunction at 3.) *See Schempp*, 374 U.S. at 225 ("It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment.").

[36] Jesse Chandler, the minor-child plaintiff and son of Michael Chandler.

and April 1997, approximately 175 out of 200 students in the lunchroom stood up and prayed aloud when Jesse entered the lunchroom. On one or more occasions, a student would announce on Jesse's arrival, 'One, two, three, pray.' I discussed this situation about two weeks after it started happening with principal Danny Ashley, who admitted to me that this was occurring in systematic fashion.

I also complained to Superintendent Parrish. Both Ashley and Parrish told me that lunch time was noninstructional and students could do whatever they want. I do not challenge the right of small groups of students or individual students to pray nondisruptively at lunchtime. However, a mass, audible prayer offered specifically because my son has entered the lunchroom is in my view harassment that school officials should intercede to stop, particularly in view of the captive-audience problem. DeKalb County agreed that its school officials would intercede to stop harassment based on religion and has not done so despite my requests and the requests of my counsel.

. . . I do not want my son harassed every day in this way and for school officials to shirk their duty to stop the harassment. The students' behavior has been organized and vindictive. In April, I told Jesse to take his lunch to my wife Barbara Chandler's classroom and to eat his lunch there to escape the harassment. I did so around the time that Jesse told me that the students were going to offer a Bible reading at lunch because they had heard I was going to be on campus that day. Technically, what I told my son to do is a violation of school policy, because

> he is supposed to be in the lunchroom during the lunch period. However, I felt that I must do something to prevent his being further stigmatized based on this lawsuit.

(Supp.Op. and Order at 21-22.). The Defendants, including Defendant Weldon Parrish, and DeKalb County official Danny Ashley, did not submit contrary testimony.

> Moreover, this Court specifically stated that students at lunchtime, depending on the factual circumstances, "should be able to engage in sectarian, proselytizing, religious speech as long as it is not, for reasons other than content, disruptive (e.g., it is loud, the speaker is aggressive, etc.)." (Mem.Op. at 22 n. 16.) 175 students ganging up on Jesse Chandler, if this is in fact "sectarian, proselytizing, religious speech," is also disruptive and aggressive. This Court's proscription of that specific conduct does not extend to banning a student's saying of grace generally.
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> 4. Students can distribute flyers about "youth group" activities to their fellow students
>
> As is made absolutely clear in the injunction, students are NOT prohibited from "distributing religious materials to classmates during non-instructional time, subject to the same time, place, and manner restrictions imposed on student distributions of nonreligious materials . . . " (Inj. at 4, 11.) In keeping with the policy of neutrality, students' distributions of tracts or invitations to church events are treated exactly like the distributions of non-religious materials and are subject to the school's time,

place and manner restrictions. The First Amendment does not require anything more. This false objection is not a reason to grant the Attorney General's motion to stay.

5. A valedictorian is not prohibited from explaining the importance of Mother Teresa to her success in school

In the hypothetical offered by the Attorney General, a class valedictorian could not explain the importance to her of Mother Teresa in her speech to the graduating class. (Mot. Partial Stay at 2.) The Attorney General complains that such a speech might be deemed a "devotional" and that school officials would be obligated to censor her speech before she gave it in order to prevent an infraction of the terms of the injunction.

The Attorney General has made a profound analytical error. Just as he assumes that all discussion or reference to Jesus is necessarily religious or proselytizing speech, he assumes that any discussion of Mother Teresa, merely because she is a religious figure, would be religious or have the purpose or effect of proselytizing. It is possible that, just as Jewish believers, Muslims and agnostics could believe that Jesus has been a shaping force in history without believing that he is the Son of God, persons could believe that Mother Teresa was a great helper of the poor without subscribing to her religious faith or religious example. Thus, speech about Mother Teresa is not necessarily religious speech.

Such a speech as the Attorney General contemplates is not a "devotional." The court's injunction is not issued in a vacuum; it is issued in the factual context of DeKalb County. In

DeKalb County, devotionals were expressly delivered over the public-address system, as all of the affidavits from employees at the Plainview School establish. They included Bible reading and prayers, and the DeKalb County affiants testified that the messages over the intercom were of "a devotional character, . . . but not religious" even while admitting that they included Bible readings and prayer. (*See* Mem.Op. and Order, Nov. 12, 1997, at 10-12 (granting summary judgment to plaintiffs against DeKalb County on nonracial challenges).) The Court made plain that it took a devotional to be religious. (*Id.* at 11.) The Court's injunction clearly contemplates that a devotional may is [sic] religious: "vocal prayer; Bible and religious devotional or scriptural readings" are proscribed by Section 6(a); prayer and "religious or devotional messages (including scriptural readings)" over the public-address system are proscribed by section 6(c); "Biblical and scriptural readings" at school-sponsored assemblies and events except where consistent with the Equal Access Act, are proscribed by Section 6(d). The Attorney General may not pry one nubbin from the Court's injunction and pretend that it stands alone, without the context of the rest of the injunction and the factual context in which the injunction was rendered.

From a 40-page opinion on the facial validity of the statute in March 1997, over 50 pages of findings of fact and conclusions of law on November 12, 1997, a 24-page summary judgment opinion on November 12, 1997 which the Court stated was to be read concurrently with the findings of fact[37] – DeKalb County ought to know what is proscribed. It does not matter if the other defendants who are not specifically enjoined as to DeKalb County practices understand the injunction or not. An entire valediction on Mother Teresa is not proscribed; a prayer is. It is unimportant that the Attorney General purports not to know what a devotional is; it matters only that DeKalb County, which is bound by the provisions of the injunction[38], knows what a devotional is. In this case, devotionals have, by all the facts, consisted of prayer and Bible reading. Nowhere in the Complaint is Mother Teresa mentioned, nor have the DeKalb County defendants purported to offer testimony about Mother Teresa. Instead, as the Court noted in its November 12, 1997 summary judgment opinion, the DeKalb County defendants sought refuge as to their "devotionals" and "words of inspiration" – which by their own affidavits turn out to be Bible readings and prayer over the intercom – in the statute's protection, themselves denominating such devotionals "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (*See* Mem.Op., Nov. 12, 1997 at 10-11.)

Noting that the DeKalb County defendants had equated "words of inspiration" with "devotionals" in response to an interrogatory inquiring about a Bible reading at a D.A.R.E. assembly, and averring that the activity was alleged to be

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[37] *See* Supp.Op. and Order, Nov. 12, 1997 n. 53.

[38] [Not adopted].

> 'non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions' by DeKalb County, the Court expressly stated: "The court finds it reasonable to conclude that mere 'words of inspiration' would not require the invocation of the Alabama school-prayer statute and that DeKalb conflated such a category of inspirational words into the category of devotions in hopes of thereby insulating them from scrutiny. The specific invocation of the statute would not be necessary for secular 'words of inspiration'. . . . (Mem.Op., Nov. 12, 1997, at 11.) (Emphasis added.)
>
> In other words, secular words of inspiration – as distinct from prayers and Bible readings – are not prohibited by anything in the Court's injunction or in its opinions. Secular presentations, including presentations drawing upon the examples of adults who have led righteous lives, are absolutely permissible.[39]

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[39] A "devotional" camouflaged by an "inspirational" patina is clearly what the Court had in mind, with reference to the facts in DeKalb County, which it exhaustively detailed, when it referred in Section 6(a) to discussions of a devotional/inspirational nature in "the classroom and in instructional settings," as distinct from graduation. It did not repeat this phrase with regard to graduation prayer. Why? Because the facts before the Court did not disclose with regard to graduation prayer, as they did with regard to prayer and devotionals over the intercom system during the instructional day, that "words of inspiration" were actually Bible readings or prayers. Thus, the Court has no reason, in regard to graduation, to say anything other than what it implicitly said in its November 12, 1997 summary judgment opinion: that secular words of inspiration are permissible in that context. At graduation, the evidence

Other federal courts agree with this court about what is proscribed activity, equating "devotional" with "prayer" and/or "Bible reading." *See Schempp,* 374 U.S. at 207 (student-chosen Bible readings followed by Lord's Prayer); *Wallace v. Jaffree,* at 42 (noting complaint's equivalence of "devotional" activities with "saying prayers in unison"); *Dayton Christian Sch. Dist. v. Ohio Civil Rights Comm'n,* 766 F.2d 932, 937 (6th Cir. 1988) ("devotional thought" is "something fresh to me from the Scriptures"); *EEOC v. Towney Engin. Co.,* 859 F.2d 610, 612 (9th Cir. 1988) (devotional services included "prayer, thanks to God, testimony and scripture reading"); *Bell v. Little Axe Sch. Dist.,* 766 F.2d 1391, 1397 n. 2 (10th Cir. 1985) (devotional exercises also called "fellowship, prayer sessions, prayer meetings, religious sessions, religious meetings, 'sharing sessions,' and 'Prayer Service/Activity' "); *Doe v. Stegall,* 653 F.2d 180 (5th Cir. Unit A 1981) (devotional activities were "poetry, Bible verses and prayers of a Protestant cast"); *Meltzer v. Board of Pub. Instr.,* 548 F.2d 559, 573 (5th Cir. 1978) (en banc), *cert. denied,* 439 U.S. 1089 (1979) (devotionals consisted of "prayer and Bible reading); *Alabama Civil Liberties Union v. Wallace,* 331 F. Supp. 966, 969 (M.D. Ala. 1971) (Judge Varner finding that Bible readings are devotionals), *aff'd per curiam,* 456 F.2d 1069 (5th Cir. 1972); *Herdahl v. Pontotoc County Schl. Dist.,* 933 F. Supp. 582, 585 (N.D. Miss. 1996) (devotionals

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being what it was, DeKalb County is enjoined from offering devotional messages, not from offering any secular inspirational message.

were short inspirational messages often including Bible reading, frequently followed by a prayer).

This case was not litigated in the dark for going on two years. The record in this case reveals what a devotional is, and in this case, devotionals look a lot like the unconstitutional activity in the above-cited cases, especially *Herdahl.* Devotionals are religious, not secular words of inspiration. DeKalb County can understand this.

The Attorney General apparently is confused by the Court's specific reference to using a "Historian's Address" as a ruse for graduation prayer – which the evidence in this case shows occurred – and has appended a prayer in the guise of a class "Historian's Address" that actually occurred to his general speculation about references to history or historical figures that have not occurred. This is not a reasonable reading, and it disregards the record.

This is the mataphorical [sic] apples and oranges dumped out of the cart into reason's path, hoping to trip it. It is clear from the Court's injunction that offering speech about historical figures, including religious ones, is permissible, and it is not permissible to offer prayer in the guise of a "Historian Address," as Sylvania High School did in 1996 and 1997 while this lawsuit was pending, the 1997 prayer occurring after plaintiffs' counsel had expressed objection to DeKalb County counsel. It is to this pointed "Historian Address" experience, not to Mother Teresa, that a particular provision for this contingency is made in the Court's injunction.

In short, the issue is not, as the Attorney General argues, whether students have free speech rights to expound on the topic of their choice in a graduation speech. The issue is whether school officials have authorized someone – anyone, student or not[40] – to insert religious exercises into the school's graduation program.

This Court, like other federal courts before it, apprehends a "devotional" to be susceptible of its common meaning.[41] Its findings of fact and summary judgment opinion bear this out:

> [I]n Interrogatory Number 11, the Plaintiffs ask: "In paragraph 50 of the DeKalb defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, 'Defendants admit that student-led devotionals have taken place at Plainview School.' Do the DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'non-sectarian, non-proselytizing, student-initiated voluntary

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[40] Including Muhammad Ali. (Mot. Partial Stay at 2.)

[41] *See Random House College Dictionary* (rev. ed.1982). A "devotion" is defined as: "1. profound dedication; consecration. 2. earnest attachment to any purpose, cause, etc. 3. an assignment or appropriation to any purpose, cause, etc. 4. Theol., the ready will to serve God. 5. Often, devotions. Eccles. religious observance or worship; a form of prayer or worship for special use." A "devotional" is defined as: "1. characterized by devotion; used in devotions. 2. Often, devotionals. a short religious service, esp. as part of a meeting, convocation, or the like." Any commonsense reading of the injunction here, informed by the evidence in this case, will indicate exactly what is meant by "devotions" and "devotionals." We are not talking about setting aside land or materials or an earnest attachment to the school principal.

> prayer, invocations, and/or benedictions' ? " DeKalb responded, "Yes."
>
> Since all of the parties, as well as the Court, appear to be of the opinion that a 'devotional' is a religious exercise, that falls within the category of 'prayer, invocations and/or benedictions,' and the Court finds that for the same reasons it has found that under established United States Supreme Court precedent that vocal prayers led by students in the classroom are unconstitutional, student-led 'devotionals' are similarly unconstitutional.

(Supp.Op. at 58 & n. 52) (citing *Engel, Schempp,* and *Lee*).

6. School officials are not required to be censors or to be clairvoyant at commencement or at student assemblies and events

> The injunction contemplates that there will be no prayer, benediction, invocation or devotional at commencement exercises. The injunction contemplates that no student will offer one. *See* Section 6(b). However, the injunction does not contemplate censorship by school officials; if it did, it would not call for school officials to take appropriate disciplinary action as they would for any violation of school disciplinary rules that is calculated to cause cessation of the conduct as it occurs and deterrence of such conduct in the future.
>
> The same is true of student assemblies and sporting events. The injunction contemplates that there will be no prayer, scriptural readings, or devotional messages over the public-address

system during the school day or at school-sponsored assemblies or events. However, the injunction does not contemplate censorship or prior restraint by school officials; if it did, it would not call for school officials to take appropriate disciplinary action as they would for any violation of school disciplinary rules that is calculated to cause cessation of the conduct as it occurs and deterrence of such conduct in the future.

This argument is simply a shibboleth. It is clear what the Court meant to prohibit, and it is clear that school officials – who have sat through a great many prayers in DeKalb County classrooms, as well as at football games, assemblies, and commencement exercises – know prayer when they see it.

7. A parent can pray for an injured player while the parent is seated in the stands

The Plaintiffs have looked in vain for a portion of the injunction that would prohibit such prayers, as the Attorney General alleges. It is difficult to see how a parent who prays while seated in the stands, whether out loud or silently, would ever fall within the category of prohibited "school organized" or "officially sanctioned" prayers over the public address system at sporting events. (Injunction at 6-7). [sic] It is also difficult to see how a school official could either prevent or permit a parent from praying in the stands and so run afoul of the injunction.

The Attorney General's similar . . . claim that a student cannot bow his head in prayer after scoring the winning touchdown is likewise

> not the reading of a reasonable person. Although Section 6(d) does not expressly provide that he can, Section 6(c) is the provision that is applicable to prayer over the public-address system at high school football games. The Attorney General's hypothetical does not feature the football player seizing the public-address system and commandeering the audience, which would be proscribed under Section 6(c).[42] These examples indicate the way in which the Attorney General has seized on one little snippet of the injunction in order to sound the alarm bell without reading particular provisions in context or with regard to the facts or the totality of circumstances.

8. Student Bible Clubs can meet on the same terms as other student clubs

According to the Attorney General, the injunction would prohibit a student-initiated Bible Club from meeting on campus, even after school hours, and would prohibit students from publicizing the times and locations of such meetings. (Mot. Part. Stay at 6-8.) only through a tortured reading of the injunction could one arrive at such a conclusion, and the law does not require courts or parties to twist themselves into knots trying to find an unconstitutional meaning in an otherwise plain directive.

The provision of the injunction which the Attorney General finds offensive reads:

> This PERMANENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal

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[42] [Not-adopted].

> Equal Access Act, 20 U.S.C. § 4071 et seq., or to quietly engage in religious activity during noninstructional times, so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves. This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious material to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distributions of nonreligious materials. . . .

(Inj. at 4.)

Manifestly, the injunction "does not affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act." (Inj. at 4.) The religious activity permitted by the federal Equal Access Act – the use of school facilities by student-initiated noncurricular Bible clubs on the same basis as other noncurricular clubs – is expressly protected. *See Westside Comm. Schl. v. Mergens.* 496 U.S. 226 (1990). The injunction also allows "students" (and there is nothing in the injunction which excludes members of the Bible Club from the general category of "students") to distribute "religious materials" to their classmates, on the same terms that nonreligious materials are distributed. Later, the Court clarified the rights of student Bible club members to have access to the public address system to publicize their meetings:

> This PERMANENT INJUNCTION DOES NOT prohibit students from making announcements

> over the school public-address system regarding meetings of noncurricular religious clubs, . . . provided that any such announcements are subject to the same time, place and manner restrictions that apply to announcement of non-religious activities.

(Injunction at 7.)

As acknowledged by the Attorney General, this is precisely what federal law requires. (*See* Mot. Partial Stay at 8 ("official recognition allows student clubs to be part of the student program and carries with it access to the school newspapers, bulletin boards, the public address system and the annual Club Fair") (*quoting Mergens*).) The combination of the two clauses should solve the Attorney General's problem with the injunction and end disputes about the rights of Bible Club members. The plaintiffs do not see how the Court could have been less vague or more narrow.

Still, the Attorney General insists that the injunction is overbroad because it makes it clear that in addition to these other rights, students may also "quietly engage in religious activity during noninstructional times, so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves."[43] (Injunction at 4.) A reasonable person would not glean from the injunction that this additional right to pursue the religious activities of the student's choice during noninstructional times interferes with the student's separate, Equal Access Act-guaranteed right to participate in a religious club on the same basis as he might in nonreligious clubs.

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[43] The Court used the word "or," to indicate another item in the list of protected student activities.

(*See* Pls.' Opp'n at 10-32.)

II. Conclusion

Based on the foregoing, the court finds that those enjoined understand their obligations and responsibilities under the Permanent Injunction. **It is also clear that contrary to the Attorney General's strained hypotheticals, the Permanent Injunction does nothing to limit individual exercise of personal religious beliefs. The court has answered most, if not all of the Attorney General's proffered hypotheticals in favor of the activity the Attorney General claims is prohibited. As articulated throughout this Order, the activities the Attorney General claims are prohibited, simply put, are not.**

Those attempting good-faith compliance with the court's Orders need not fear contempt citations. However, the court expects compliance with its Permanent Injunction unless and until it is further clarified by the Eleventh Circuit Court of Appeals or the United States Supreme Court. Counsel, in particular, are directed to make every effort to explain to their clients, in building block fashion if necessary, the exact nature and scope of the Permanent Injunction, and to endeavor to quell misunderstandings or misrepresentations, whether genuine or feigned, the latter of which appear to be running rampant.[44]

The political posturing that has followed this case encourages divisiveness and apprehension, benefits neither the citizens nor the school-children of Alabama, and clouds the real issues raised by this suit: the coercive religious practices engaged in or allowed by state officials in DeKalb County. In conformance with long established precedent, which this court is bound to follow and which the Attorney General now appears to recognize as controlling, the Permanent Injunction simply proscribes state-established religion and endeavors to ensure the state's neutrality in matters of religion in the public schools. An informed understanding of the Permanent Injunction discloses nothing more.

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[44] The court notes the December 8, 1997 issuance of a memorandum by the Attorney General and the State Superintendent of Education regarding "Permissible Activities in the light of *Chandler v. James.*" The court commends any good-faith effort to "clear up any misunderstandings" and "provide assistance to public school administrators and teachers." (*See* December 8, 1997 Mem., Attach. C; *see also,* Pls.' Add. Evid.) This memorandum was issued in conjunction with the Attorney General's December 8, 1997 Press Release. (*See* AG December 8, 1997 Press Release, Attach. B; *see also,* Pls.' Add. Evid.) Both documents attempt to articulate guidelines regarding permissible and impermissible conduct. Because the question of the propriety of the Attorney General and Superintendent's guidelines is not before the court, the court will not examine the issued guidelines in light of any of its previous Orders at this time.

Interestingly, however, although the Attorney General purports to have derived these guidelines exclusively from "previous opinions issued by the U.S. Supreme Court and the Eleventh Circuit Court of Appeals, rather than the *Chandler* ruling in October by a U.S. District Court in Montgomery," (AG December 8, 1997 Press Release at 1; *see also* Pls.' Add. Evid.), the guidelines track this court's Permanent Injunction and March and November 1997 Orders, as well as the cases relied on by this court in issuing those Orders. It is indeed odd that the Attorney General now cites those cases for support when they were conveniently ignored prior to the court's March 1997 Memorandum Opinion and Order. Nevertheless, the court commends any truthful dissemination of information regarding the issue of religion in the public schools.

ORDER

Based on the foregoing, it is CONSIDERED and ORDERED that Defendants' Motion For Partial Stay Of Permanent Injunction be and the same is hereby GRANTED IN PART and DENIED IN PART. Defendants' Motion is GRANTED as to the twelve words in section 6(a) of the court's three-thousand, seven-hundred and fourteen word Permanent Injunction reading "quietly" and "so long as it does not unduly call attention thereto and."[45] (*See* Permanent Inj. at 4, lines 14-16.) Otherwise,

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[45] Paragraph 5 of section 6(a) of the Permanent Injunction, with those portions stayed, should read:

> This PERMANENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. Section 4071, et seq, or to . . . engage in religious activity during noninstructional times, . . . so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves. This

Defendants' Motion For Partial Stay Of Permanent Injunction is DENIED. All other provisions of the October 29, 1997 Permanent Injunction shall remain in full force and effect absent modification by the Eleventh Circuit Court of Appeals or the United States Supreme Court. The Parties are DIRECTED to fully comply with the terms of the Permanent Injunction, absent the portion of section 6(a) STAYED above, as applicable.

> PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place, and manner restrictions imposed on student distributions of nonreligious materials, subject to the provisions of paragraph 6(e) below.

Michael CHANDLER, et al., Plaintiffs,

v.

Fob JAMES, et al., Defendants.

No. CV 96-D-169-N.
United States District Court,
M.D. Alabama.
Nov. 12, 1997.

SUPPLEMENTAL OPINION AND ORDER

DE MENT, District Judge.

Pending before the court are several motions and procedural matters that the court finds are due to be addressed.

I. Plaintiffs' November 6, 1997 Motion To Enjoin The Etowah County Circuit Court Proceedings

On November 4, 1997, the Circuit Court of Etowah County issued a temporary restraining order, ("T.R.O."), "to prohibit the implementation of the District Court Permanent Injunction in this jurisdiction."[1] (T.R.O. at 3.)

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[1] The court issued a Permanent Injunction in this cause on October 29, 1997 prohibiting and enjoining: (1) enforcement of Alabama Code Section 16-1-20.3 by various state officials; and (2) specific religiously coercive practices in DeKalb County undertaken by school officials pursuant to Alabama Code Section 16-1-20.3. The Permanent Injunction, as well as the court's March 12, 1997 Memorandum Opinion and Order, also detail activities that are permitted pursuant to the First Amendment of the United States Constitution, as interpreted by the United States Supreme Court and the Eleventh Circuit Court of Appeals.

On November 6, 1997, Plaintiffs filed a "Motion To Enjoin Proceedings In The Etowah County Circuit Court." On the same date, the court issued an Order inviting all parties to respond to Plaintiffs' Motion on or before 2:00 P.M., November 10, 1997.

On November 10, 1997, the Defendant Attorney General of Alabama filed a Response stating that the Etowah County action, styled *Womack v. Etowah County Board of Education et al.*, CV-97-1282-RSM, was voluntarily dismissed by the plaintiffs in that action. A copy of the "Voluntary Dismissal of Action" was attached to the Attorney General's pleading. In addition, and on the same date, the Defendant Governor of Alabama filed a Response in which he urged dismissal of Plaintiffs' Motion to Enjoin based on the plaintiffs' voluntary dismissal of the proceedings in the Circuit Court of Etowah County.

Based on the pleadings of the Governor and the Attorney General, as well as the notice of dismissal attached to the Attorney General's pleading, the court finds that Plaintiffs' Motion To Enjoin the Etowah County proceeding is due to be denied as moot.[2]

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[2] Nevertheless, the court notes that the All-Writs Act, 28 U.S.C. § 1651, and the express exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283, allow federal courts to exercise their discretion to enjoin state proceedings. The court is acutely aware of the principle of comity inherent in our federalist system of government, and the court is reluctant and hesitant to enjoin proceedings in a state court. Federal enjoinment of state litigation is to be the exception, not the rule. *Delta Air Lines, Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582, 585 (11th Cir. 1983). The court is quick to note, however, that when a state court in effect

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asserts the power of appellate review over the judgments and orders of a federal court properly exercising its jurisdiction, and in addition, the state court interferes with the proper and lawful orders of the federal court, the state court is acting without jurisdictional authority, and enjoinment of its proceedings may be proper. *See generally Mitchum v. Foster,* 407 U.S. 225, 242 (1972); *Wesch v. Folsom,* 6 F.3d 1465 (11th Cir. 1993), *cert. denied,* 114 S. Ct 696; *Kelly v. Merrill Lynch,* 985 F.2d 1067 (11th Cir. 1993); *Battle v. Liberty Nat'l Life Ins. Co.,* 877 F.2d 877 (11th Cir. 1989); *McCoy,* 708 F.2d 582; *Southern Petrol. Corp. v. Harper,* 273 F.2d 715 (5th Cir. 1960); *Jacksonville Blow Pipe Co. v. R.F.C.,* 244 F.2d 394 (5th Cir. 1957).

This court, and ALL courts for that matter, have the duty and obligation to preserve, protect, and defend rights guaranteed to all citizens under the United States Constitution conflicting state laws are "null and void," and "without effect." *See Edgar v. Mite Corp.,* 457 U.S. 624, 631 (1982); *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981) (citing *McCulloch v. Maryland,* 4 Wheat. 316, 427 (1819)); *see also* U.S. Const. art VI; *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304, 340-41 (1816); *Ex parte Sizemore,* 611 So.2d 1069, 1071 (Ala. 1993); *White v. Reynolds Metals Co.,* 558 So.2d 912 (Ala. 1990), *cert. denied,* 469 U.S. 912 (1990). Indeed, the Governor and Attorney General of Alabama recognize this basic foundation of our system of government: "The State of Alabama cannot create, expand, or diminish federal constitutional rights. The State of Alabama must, however, recognize those rights and in conformity with federal law, require its citizens to follow those rights." (Governor and Attorney General's Resp. Br. On Constitutionality of Alabama Code Section 16-1-20.3 at 5-6, filed February 6, 1997.) As the legal, social, and political dictates of the last half-century have shown, federal courts take seriously this responsibility to protect such rights, and can and will intervene where necessary and proper.

II. Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Permanent Injunction[3]

Also before the court is Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Injunction pursuant to Rule 59 of the Federal Rules of Civil Procedure.[4] Plaintiffs filed a Brief in support of their Motion on the same date. Plaintiffs contend that "specific factual findings in [the court's October 29, 1997 Permanent Injunction] will be of great benefit to the parties." (Pls.' Mot. to Alter Or Am. at 1.) In addition, Plaintiffs contend that specific factual findings will satisfy the technical requirements of Rule 65.[5] (Pls.' Br. In Supp. of Mot.

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[3] The court retains jurisdiction over this action during the pendency of Plaintiffs' Rule 59 Motion. *See* Fed. R. App. P. 4(a)(4); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982).

[4] Rule 59(e) of the Federal Rules of Civil Procedure provides:

> (e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

Fed.R.Civ.P. 59(e). The court issued its injunction on October 29, 1997. Accordingly, Plaintiffs' November 10, 1997 Motion To Alter or Amend comports with the requirements of Rule 59(e). *See* Fed.R.Civ.P. 56(e) and 6.

[5] Rule 65(d) provides:

> (d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other documents, the act or acts sought to be restrained. . . .

Fed.R.Civ.P. 65(d).

to Alter or Am. at 1-2.) Accordingly, Plaintiffs request that the court "make explicit its reasons for granting the injunctive relief it did." (*Id.* at 2.)

Prior to the filing of Plaintiffs' Motion To Alter Or Amend, the court was in the process of formulating and entering specific findings of fact and conclusions of law in support of its October 29, 1997 Permanent Injunction, as well as addressing pending motions before the court. On October 23, 1997, counsel for some of the named Defendants in this action, filed a "Request For Conference Call." In that request, counsel stated that "[a] long-term and respected educator in the DeKalb County School System has been quoted as saying that 'I'm not going to break the law but I want to find out, or I want our attorneys to find out, if a federal judge can do whatever he wants to whenever he wants to.' " (Req. For Conference Call ¶ 1 (quoting newspaper article attached as App. A).) Counsel stated that the purpose of the Request was "to clarify whether 'a federal judge has the authority to tell school officials and administrators in DeKalb county how to handle the issue of school prayer.' " (*Id.* at 1.) Counsel stated to the court that he sought a conference call "with the Court and the parties to see what rational procedure could be followed to make sure [the educator] is clear what jurisdiction this Court has over public officials in DeKalb County and what can be done to assure that [the educator] does not engage in action that would put him or others similarly situated in contempt of this Court." (*Id.* ¶ 2.)

Counsel's Request reinforced the sensitive and urgent nature of the matter and issues before the court. Prior to his request, the court had issued its March 12, 1997 Memorandum Opinion and Order, ("March 1997 Opinion and Order"), in which the court found that Alabama Code Section 16-1-20.3 was unconstitutional and granted summary judgment for the Plaintiffs on that issue. Plaintiffs' Complaint, however, sought not only a declaration that § 16-1-20.3 was unconstitutional, but also relief from the alleged religiously coercive activities of DeKalb County school officials relying on § 16-1-20.3 in support of their actions.

Even after the court's March 1997 Opinion and Order finding the statute unconstitutional, as noted *supra*, as of October 23, 1997, several motions and issues were still pending, including the issue of the relief necessary to alleviate the alleged religiously coercive activity in the DeKalb County School System. Based on counsel's request, the plethora of pleadings filed by the parties suggesting courses of action and grounds therefor, and the evidence in the record, the court entered its Permanent Injunction on October 29, 1997.[6]

As the introductory paragraph of the injunction notes, it was based on "the court's previous opinions, as well as the record as a whole in this cause." (Permanent Inj. at 1.) The court entered its Permanent Injunction for the reasons articulated above, and herein, and now enters this Supplemental Opinion and Order, including the following "Findings Of Fact And Conclusions Of Law," pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.[7]

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[6] Additionally, in issuing its October 29, 1997 Permanent Injunction, and the "Findings Of Fact And Conclusions Of Law" articulated in this Supplemental Opinion and Order, the court applied the requirements and standards of Federal Rule of Civil Procedure 65, as well as interpretive case law, in determining the propriety of issuing its Permanent Injunction.

III. Findings Of Fact And Conclusions Of Law[8]

In order to assist the court with identifying evidence in the record, the court directed the parties on April 24,

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[7] Rule 60(a) provides:

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Fed.R.Civ.P. 60(a). The court is aware of the filing of notices of appeal by various parties in this action. However, as noted, the court retains jurisdiction of this action during the pendency of Plaintiffs' Rule 59 Motion. *See* Fed. R.App. P. 4(a); *Griggs*, 459 U.S. at 59. Further, the court believes that it is acting within the confines of Rule 60(a).

In the alternative and in addition to the court's issuance of this Supplemental Opinion and Order pursuant to Rule 60(a), the court finds that Plaintiffs' Motion To Alter Or Amend The Court's October 29, 1997 Injunction is due to be granted. The court's specific findings of fact and conclusions of law are articulated *infra*.

[8] The court makes few factual findings in connection with its March 1997 Opinion And Order on the facial validity of

1997, to identify with specificity the evidence in the record at that time and to attach where possible copies of any documentary evidence already in the record, without further argument or embellishment, that was pertinent to dispositive motions.[9] These submissions, pertinent to

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Alabama Code Section 16-1-20.3 as it believes that matter to be one of law and not one of fact. It finds that the only "fact" not already addressed in its previous opinion that is relevant to statutory construction is whether the persons challenging the statute have standing to do so. The court finds that Michael Chandler is an assistant principal at Valley Head High School, within the jurisdiction of the DeKalb County Board of Education, and the father of the minor child Jesse Chandler, a student at Fyffe School, within the jurisdiction of the DeKalb County Board of Education. (*See* Stipulation Number 15 regarding DeKalb County Board of Education's control over these schools.)

[9] This was necessary because the court had directed that all evidence bearing on factual issues relevant to pending dispositive motions involving DeKalb County be submitted by November 21, 1996. As of that time, however, the record establishes that the DeKalb County Board of Education had not yet responded fully to Plaintiffs' discovery requests and did not do so until after November 21, 1996. When the Plaintiffs received such responses, they submitted them in the order in which they were received, in connection with filings that had nothing to do with discovery *per se*. As a consequence, evidentiary submissions bearing on both dispositive motions and the Plaintiffs' general request for injunctive relief are dispersed throughout the record. For example, DeKalb Defendants' Answers to Plaintiffs' First Set of Interrogatories, apparently served December 3, 1996, were filed with the court as an exhibit to a motion having no relevance to a discovery dispute, as was [DeKalb] Defendants' Response to Plaintiffs' Request for Admissions, apparently served on October 10, 1996. DeKalb Defendants' Responses to Plaintiffs' First Discovery Requests, served February 4, 1997 (answering interrogatories

dispositive motions, were received in May 1997 from the Plaintiffs and from DeKalb County.

However, further evidence bearing on the Plaintiffs' entitlement to injunctive relief against the DeKalb County Board of Education generally has been filed since May 15, 1997 and is detailed in these findings of fact and conclusions of law. This evidence, generally related to religious practices since that time, has not been challenged or controverted by the DeKalb County Board of Education in any way, by affidavit or otherwise. The court finds that such evidence is appropriately received as bearing on entitlement to injunctive relief against DeKalb County and notes that DeKalb County was welcome to submit, at any time, any evidence that might contravene documents,

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not answered on October 10, 1996) are part of Exhibit C to Plaintiffs' Supplement to Motion for Sanctions and Opposition to DeKalb Defendants' Request for Time. Evidence of probative value, generally, as it relates to injunctive relief is sprinkled throughout the record and has continued to trickle in through the 1997-98 academic year.

Plaintiffs' filings responding to DeKalb County's May 15, 1997 submission include protest that DeKalb may not offer as "stipulations" matters as to which the Plaintiffs refused to stipulate, specifically those stipulations after September 1996 numbered 75 through 81 proffered by DeKalb. Upon Plaintiffs' motion, DeKalb County withdrew any materials that were submitted in May 1997 that varied from evidence that was already in the record.

The court does not rely on any matter that was voluntarily withdrawn by DeKalb upon Plaintiffs' protest that they were untimely attempts to rehabilitate and recast DeKalb County's case after dispositive motions were under submission. The court relies on what the Plaintiffs and DeKalb have evidently agreed are actual stipulations among themselves.

affidavits, and other evidence submitted by the Plaintiffs in support of their claim for injunctive relief, if it had Such to offer. All of this evidence is aimed at demonstrating to the court that violations have continued despite the pendency of this lawsuit and despite the court's March 1997 Opinion and Order. Accordingly, the court finds it proper and just to consider all evidence in the record for the purpose of issuing these findings of fact and conclusions of law as they bear upon the Plaintiffs' entitlement to permanent injunctive relief and will do so.

The court specifically notes that the Plaintiffs have brought both a facial and "as applied" challenge and that the DeKalb County Board of Education has specifically adopted the position that prayer and devotionals over the intercom, classroom prayer, prayer at high school graduations, and prayer at student assemblies such as D.A.R.E. ceremonies and events are "non-sectarian, non-proselytizing, student-initiatedvoluntary prayer, invocations, and/or benedictions." This is the language of Alabama Code Section 16-1-20.3 which this court has previously found to be unconstitutional. Having taken this position in discovery, the DeKalb County Board of Education took the position at summary judgment that the court's decision regarding the statute would resolve most if not all aspects of Plaintiffs' nonfacial challenge.

A. Factual Findings of Pre- and Post-Suit Conduct As To Pervasiveness Of Unconstitutional Conduct In DeKalb County

The court finds the following relevant to the propriety of awarding permanent injunctive relief:

1. The court finds that school-sponsored religious activity in violation of the Establishment Clause of the First Amendment to the United States Constitution is pervasive and recurrent in the public schools of DeKalb County. The court has examined the degree of scienter of the DeKalb County School Board and its employees and agents; whether the conduct of the Defendants has been isolated or recurrent; whether the Defendants have recognized the wrongfulness of the conduct complained of; and the sincerity of any repentance of the conduct.[10]

The court finds that absent permanent injunctive relief, the substantial likelihood is that the DeKalb County Board of Education and its employees and agents will ignore the court's orders just as it has disobeyed the rulings of higher courts for years – before and after Alabama Code Section 16-1-20.3 was enacted and before and after the Eleventh Circuit outlawed prayer over the public-address system at school-sponsored sporting events. Indeed, the record in this case suggests to the court that its March 1997 Opinion and Order has been unobserved since it was entered. Although the court did not at that time make any specific orders to DeKalb County regarding graduation prayer, prayer over the public-address system, and other challenged matters, the court stresses that it drew that opinion from existing controlling case law and did not pronounce "new" general Establishment Clause law.

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[10] *See United States v. Laerdal Mfg. Corp.*, 73 F.3d 852 (9th Cir. 1995). *See also Newman v. Alabama*, 683 F.2d 1312 (11th Cir. 1982) (discussing substantial likelihood of recurrence).

As recently as October 23, 1997, counsel for DeKalb County filed a "Request for Conference Call," which states that certain educators wanted clarification on the question of whether "a federal judge has the authority to tell school officials and administrators in DeKalb County how to handle the issue of school prayer" and "if a federal judge can do whatever he wants to whenever he wants to." The pleading specifically expresses the concern of DeKalb County counsel that the Sylvania High School principal and "others similarly situated" would be found by the court to be in contempt. Appended to the filing submitted by the DeKalb County Board of Education is a newspaper article titled, "Principal questions judge's authority in prayer lawsuit." Also appended to that filing is a Letter to the Editor over principal Gary Carlisle's[11] signature which makes plain that Mr. Carlisle believes that only elected officials, and not the judiciary, may traffic in the First Amendment's religion clauses.

Mr. Carlisle's very recent letter states, "I will resist government without representation" in obvious reference to the judiciary and judicially imposed proscriptions on state-sponsored prayer. The court finds the Carlisle letter suggestive of a motive to violate the court's orders and to continue with the *status quo* of unconstitutional conduct in DeKalb County public schools. (Nor is this the only such press clipping with which the court has been deluged in this case.) The court can discern in this evidence no recognition of the wrongfulness of school-sponsored religious activity, sees scienter in the vow to "resist" judicial action, and discerns no repentance of past unconstitutional conduct. The court does not mean to single out Mr. Carlisle for censure. The court finds this statement emblematic of DeKalb County school officials' historical attitudes – judging from the record before the court, this statement typifies an attitude. The court references it specially because it is so recent.

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[11] There is confusion as to the spelling of this school principal's name throughout the record. Mr. Chandler has spelled it "Carlyle," counsel for DeKalb County has spelled it "Carlyle," the reporter for the *Fort Payne Times Journal* spelled it "Carlyle," and the "Letter to the Editor" submitted to the court is signed "Gary Carlisle, Principal, Sylvania High School." It is apparent that all parties refer to the same individual and identify him as the principal of Sylvania High School.

The court also finds relevant that in Spring 1996, all Parties executed an agreement that DeKalb County schools would not undertake any practices alleged by the Plaintiffs to be unconstitutional pending this court's determination of their constitutionality. This agreement, styled "Joint Motion to Vacate This Court's Order and Agreement of Voluntary Cessation of Certain Activity Pending this Court's Decision" (hereafter "Joint Motion"), was filed with the court in March 1996.

That document, in the court's view, constitutes a representation of the parties *to the court*, even if the court could not or would not enforce a voluntary agreement among counsel as Plaintiffs requested.[12] However, the fact that the DeKalb County School Board would represent to the court and other Parties that challenged conduct would cease pending the court's final determination – and then continue with such conduct – persuades the court of the pervasiveness of school-sponsored religious activity in DeKalb County and concomitantly, of the need to assure that injunctive relief can be enforced that will be effective to deter unconstitutional conduct in the future. Had the parties not made that agreement, the court would have proceeded with dispatch on the Plaintiffs' motion for preliminary injunction[13] and would have enforced any orders pursuant thereto. Those orders would have been consistent with the court's March 1997 Opinion and Order on the constitutionality of Alabama Code Section 16-1-20.3, finding that the statute violated both the Free Exercise and Establishment Clauses under the precedential

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[12] The court notes that as a matter of law, voluntary cessation is not a defense to unconstitutional conduct. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Jurisdiction may abate if there is no reasonable expectation the alleged violations will recur and if intervening events have completely and irrevocably eradicated the effects of the alleged violations. *Hall*

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v. Board of Sch. Comm'rs of Conecuh County, 656 F.2d 999 (5th Cir. Unit B 1981). The court concludes that this is plainly not the case here and that violations have continued to occur during the pendency of this lawsuit.

[13] The court had initially consolidated the preliminary injunction with the hearing on the merits. The Defendants' action had the effect of forcing forbearance of the hearing on the Plaintiffs. At the Parties' request, in the terms of the Joint Motion, the court vacated its Order setting an immediate hearing on the merits and set a trial date. In the interim, dispositive motions were filed as to issues specific to DeKalb County and the parties agreed to submit the facial challenge to the statute on briefs. (*See* Order of February 28, 1996 vacating hearing date.)

The Joint Motion promised that the school board Defendants, the DeKalb County Board of Education, and the Talladega City School Board, would cease:[14]

1. "prayers, whether student-initiated or otherwise, at school-sponsored sporting events that use public address systems;"

2. "prayers and devotionals, whether student-initiated or otherwise, at school-sponsored assemblies, held during the school day . . . except that noncurricular clubs may meet during noninstructional time;"

3. "prayers and devotionals during classroom time during the school day; except that students have the right to pray, individually and nondisruptively, except when required to be actively engaged in school activities, *e.g.*, students may not decide to pray just as the teacher calls on them;"

4. "distribution of religious literature, including Bibles and invitations to religious events, to students by school officials or non-school persons during the school day on school premises; however, students and non-school persons have the right to distribute religious literature on school premises during noninstructional time, subject to the same reasonable time, place and manner

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[14] Both Governor James and then-Attorney General Sessions disavowed any knowledge of the actions of school officials in DeKalb County in the Joint Motion. The Governor asserted therein that "he is not able to determine what activities may have heretofore been engaged in by other defendants, *i.e.*, school officials or agents and school boards." The Attorney General asserted that the activities in DeKalb County were "purely local in nature." (Joint Motion, ¶¶ 4, 5.)

restrictions imposed on the distribution of all non-school literature;"[15]

5. "prayers and devotionals, whether student-led or otherwise, at school-sponsored graduation ceremonies;"

6. "the meetings of student Bible clubs, including the meetings of the Fellowship of Christian Students, occurring during instructional time; however, all noncurricular student clubs may be allowed to meet pursuant to the Equal Access Act during noninstructional time." (Joint Motion, ¶ 6 and subparts.)

In exchange for this agreement not to do what was sued on here until the court ruled on the Plaintiffs' constitutional challenge, the Plaintiffs voluntarily "agree[d] not to seek preliminary injunctive relief in reliance upon defendants' agreement to cease the activities . . . pending a determination of their constitutionality." (Joint Motion, ¶ 8.)

Plaintiffs' "reliance upon defendants' agreement to cease the activities" was not misplaced as to the Talladega City Defendants. The Plaintiffs brought no complaint to the court concerning Talladega's performance on its promise to them and its representation to the court. The Plaintiffs' claims against the Talladega Defendants were resolved through a consent decree, over the objections of the Governor and the Attorney General which both the Plaintiffs and the Talladega Defendants urged the court to overrule in both separate and joint filings. There have been no complaints of violations of that consent decree.

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[15] The absence of any policy of general applicability in DeKalb County public schools as to time, place, and manner restrictions is admitted by Weldon Parrish in his affidavit executed October 30, 1996.

In contrast, the Plaintiffs have produced a mound of evidence of DeKalb County's breaches of the Joint Motion, which indicates to the court DeKalb County's predisposition to break promises. The court assigns weight to this, not because it has any inclination to enforce the terms of a voluntary agreement among counsel, but because it persuades the court of the depth of resistance toward ceasing unconstitutional practices on the part of the DeKalb County School Board and of the pervasiveness of school-sponsored religious practices in DeKalb County, that do not cease despite express agreement, the pendency of a lawsuit, and the court's earlier March 1997 Opinion and Order. If DeKalb County school officials persist in conduct alleged to be unconstitutional while this suit is pending and despite their promise not to persist, this court could not expect its Orders to be obeyed, any more than the Eleventh Circuit and the United States Supreme Court have been obeyed, absent an enforceable enjoinment of specific practices that are demonstrably violative of law.

Shortly after the Joint Motion was signed, Michael Chandler tendered a Declaration informing the court that he attended the 1996 commencement at Sylvania School and witnessed a "Historian Address" delivered by a student that ended, "In His name we pray, Amen." Exhibit A to that Declaration is a copy of the Sylvania School program on which is printed an entry for "Historian Address." Mr. Chandler also submitted copies of the programs for various other commencements in DeKalb

County public schools which list invocations and benedictions given by students and copies of the programs for various other assemblies and school-sponsored events which indicate that devotions were given. Several of these documents show that DeKalb County public schools printed the commencement and baccalaureate services on the same program and that school principals took part in the baccalaureate services by way of introducing ministers. (All of these documents have been authenticated by the DeKalb County School Board in the discovery process.)

Mr. Chandler also testified in that Declaration that a Bible reading was given by a student at a compulsory assembly at Fyffe High School while Jesse Chandler was in attendance. Mr. Chandler testified in this Declaration that he complained to the principal of Fyffe School about violations of the Parties' agreement and was told in response that the principal knew nothing about the Joint Motion and that he had not been informed by the DeKalb County Superintendent's office of the Parties' agreement. Other evidence in the record indicates that an individual school board member, Willard Israel, indicated not only that he would not comply with any agreement, but that the agreement was a matter between the attorneys and not the Parties. (Ex. B to Pls.' Supp. to Mot. for Sanctions and Opp. to DeKalb Defs.' Req. for Time.) DeKalb County has never challenged the Plaintiffs on any of these matters or offered any evidence to contravene Mr. Chandler's testimony as to the matter of the Bible reading/student devotional at Fyffe and school officials' professed ignorance of the terms of the Joint Motion.

Mr. Chandler offered a further Declaration dated November 10, 1996, in support of the Plaintiffs' November 21, 1997 Motion to Enforce the Joint Motion. A videotape made by Mr. Chandler depicting (among other things) prayer over the public-address system at a Geraldine High School football game on October 19, 1996 was submitted as Exhibit B to the Declaration dated November 10, 1996.[16] The court has viewed the videotape, and considers it powerful evidence of DeKalb County Schools' defiance of Eleventh Circuit law as pronounced in *Jager* almost a decade ago as well as evidence of DeKalb County's disregard for the proceedings pending here. The videotape features one of the intervenors,[17] a minor at Geraldine High School, leading the prayer and discussing her action with the news media. (*See also* Exhibit C to Plaintiffs' Opposition to motion to Intervene.)

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[16] That videotape also shows student-led prayer over the microphone at graduation. It is of poor quality, but it is clear what is depicted. Mr. Chandler testified in his Affidavit of February 1 that he had videotaped graduation prayers and pregame prayers prior to the filing of this lawsuit. The graduation prayer depicted on this videotape is the prayer occurring at graduations prior to the filing of this lawsuit.

The court reiterates that there are two videotapes, one including pre-suit graduation exercises and pregame prayer in a series of short clips and ending with the October 19, 1996 prayer over the public-address system by Ms. Sexton at Geraldine High School, and the other depicting the 1997 graduation prayer at Collinsville, Plainview, and Sylvania as well as classroom prayer at Geraldine. The videotape filed November 21 with the Motion to Enforce includes the pre-suit graduation prayer as well as the post-suit October 1996 football game prayer. The first videotape is Exhibit B to the Plaintiffs' Motion to Enforce; the second, showing the 1997 graduation prayers, is Exhibit B to the June 9, 1997 Declaration of Michael Chandler. (*See* Affidavit of Michael Chandler, Feb. 1, 1996, at ¶¶ 6, 9; Plaintiff Michael Chandler's Designation of Exhibits and Materials Already in the Record for Rule 56 Purposes, n. 4 (filed November 21, 1996).)

Mr. Chandler's November 10, 1996 Declaration also indicates that devotionals took place in elementary schools after the Joint Motion was signed and that Bible Club students at Valley Head High School were excused from class on May 24, 1996 to distribute information about baccalaureate services to each classroom. Mr. Chandler also testified that members of the band were required to attend the baccalaureate service at Valley Head High School. Additional programs from 1996 school graduations were appended as exhibits to this Declaration. Programs showing the same practice before the filing of this lawsuit were appended to the Complaint, and the Plaintiffs had alleged their illegality. Even under scrutiny as to these practices, school officials in DeKalb County did not desist.

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[17] The intervenors were allowed in for the limited purpose of *amicus curiae* participation. The court accepted affidavits from them. Had they intervened timely, when this suit was filed or before summary judgment submissions and the court's March 1997 opinion, the court would have granted intervention. The intervenors' affidavits do not merit separate or extended discussion. Bible Clubs may meet consistent with the Equal Access Act; religious jewelry may be worn; students may wear "Victory Line" t-shirts of the sort depicted in Exhibit C to Plaintiffs' Opposition to Motion to Intervene or in the Alternative, Motion to Strike, consistent with school policy; students may organize the "Meet me at the Pole" event; and may generally do all the things the court discussed at pages 23 and 24 of its earlier opinion – and more. This court does not undertake to give a complete catalog of possible free exercise rights. The intervenors' position is apparently that the Free Exercise Clause negates the Establishment Clause. The court has already rejected that position.

Yet a further Declaration Under Penalty of Perjury, executed June 9, 1997, was tendered by Mr. Chandler describing events at May 1997 graduation ceremonies and prayer in the classroom at Geraldine School. Once again, some of these events were captured on videotape.[18] The videotape shows that there definitely is prayer at the Plainview High School graduation in the manner in which Mr. Chandler's June 9, 1997 Declaration describes it. In addition, the court has observed that there definitely is prayer at a graduation ceremony which ends by invoking the name of Jesus, as paragraph 3 of the Declaration recites regarding Sylvania High School.

At Sylvania High School, Mr. Chandler testified in this Declaration, "Just as occurred last year under the guise of a 'Historian Address,' as I swore in my previous Declaration, the 'Greetings' by the class 'historian' were explicitly a prayer. The 'historian's' prayer ended in

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[18] The prayer in the classroom, according to the Declaration of the reporter who observed and filmed the classroom prayer which has been submitted to the court on videotape, was in the sixth-grade classroom prior to the lunch period. Jim Melchiorre's Declaration establishes that the teacher announced lunch and the students stood, recited the Pledge, and prayed *en masse.* Mr. Melchiorre testified that he was told by student/intervenor Leslie Sexton to go to this particular classroom to film.

Jesus' name and was offered over the public-address system. Gary Carlyle, the principal, was seated in close proximity at the time of the prayer, as the videotape accompanying this Declaration depicts. I believe that the phrase 'historian address' or the designation of a student as historian' is Sylvania's code for prayer at graduation." This lawsuit was pending at the time of both the 1996 and 1997 Sylvania graduations described.

Mr. Chandler further testified in his June 9 Declaration that at Collinsville High School in May 1997, for example, he witnessed both a benediction and an invocation. He testified that at Plainview High School, a student walked to the microphone to announce an invitation to prayer and walked away from the microphone to lead the prayer during the time listed on the school program as the "Special Music" segment of the ceremony. At Valley Head High School, he testified, a student recited the Lord's Prayer.

Once again, the June 9 Declaration was accompanied by various programs from various ceremonies evidencing benedictions, invocations, and baccalaureate exercises listed on the same program as the graduation exercises, just as was the affidavit that accompanied the Complaint.

In the June 9 Declaration, Mr. Chandler also testified that Jesse Chandler has been harassed by schoolmates at Fyffe School:

> Fyffe School students are led to lunch every day and cannot leave the campus for lunch; the school has a closed-campus policy. In approximately October 1996, Jesse began experiencing harassment in the lunchroom. I am aware that the agreement signed by my lawyer and

DeKalb's lawyers states that school officials will intercede to stop harassment based on religious belief.[19] Virtually every day between October 1996 and April 1997, approximately 175 out of 200 students in the lunchroom stood up and prayed aloud when Jesse entered the lunchroom. On one or more occasions, a student would announce on Jesse's arrival, 'One, two, three, pray.' I discussed this situation about two weeks after it started happening with principal Danny Ashley, who admitted to me that this was occurring in systematic fashion.

I also complained to Superintendent Parrish. Both Ashley and Parrish told me that lunch time was noninstructional and students could do whatever they want. I do not challenge the right of small groups of students or individual students to pray nondisruptively at lunchtime. However, a mass, audible prayer offered specifically because my son has entered the lunchroom is in my view harassment that school officials should intercede to stop, particularly in view of the captive-audience problem. DeKalb County agreed that its school officials would intercede to stop harassment based on religion and has not done so despite my requests and the requests of my counsel.

. . . I do not want my son harassed every day in this way and for school officials to shirk their duty to stop the harassment. The students' behavior has been organized and vindictive. In April, I told Jesse to take his lunch to my wife Barbara Chandler's classroom and to eat his lunch there to escape the harassment. I did so

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[19] *See* Exhibit A to Joint Motion.

> around the time that Jesse told me that the students were going to offer a Bible reading at lunch because they had heard I was going to be on campus that day. Technically, what I told my son to do is a violation of school policy, because he is supposed to be in the lunchroom during the lunch period. However, I felt that I must do something to prevent his being further stigmatized based on this lawsuit.

Two further Declarations of Mr. Chandler were submitted to the court in September 1997, during this school year. One, as amended, establishes that Mr. Chandler witnessed a prayer over the public-address system at a football game with the school principal in attendance. The second September 1997 Declaration offers testimony that at Valley Head High School, on September 12, 1997, the public-address system was used at a high school football game for announcing that " 'a couple of moments of prayer' would be had following the National Anthem."

All of these activities took place or continued to take place after the court had issued its March 1997 Opinion and Order, which makes express reference to the Eleventh Circuit's specific proscription of prayer over the public-address system in *Jager* at pages 9 and 10.

There is further evidence in the record predating the court's March 1997 Opinion and Order.

In his affidavit submitted with the Complaint, Mr. Chandler testified that the 1995 DeKalb County graduation ceremonies and other year-end activities included prayers and devotionals. Mr. Chandler testified in this affidavit that Crossville High School used clergy for this purpose; Exhibit 1 to this affidavit demonstrates that the

Reverend Bob Coleman gave an invocation and benediction at Awards Night May 18, 1995 and that the Reverend Wes Garner gave an invocation at graduation. A Plainview School Announcement is discussed in Mr. Chandler's affidavit and is Exhibit 2 thereto; Mr. Chandler testified that students were excused from class to attend baccalaureate practice in May 1995. Exhibit 2 states, "May 19 – 3rd period – (Friday) – BACCALAUREATE PRACTICE – This will take only one period. You will have regular classes 4, 5, 6, 7 periods." Exhibit 2 also indicates that senior-class members should get any materials for inclusion on the graduation program, such as "singers, songs, prayers" ready for submission to the printer of the school's graduation program.

Exhibits 3, 4, 5 and 6 to the affidavit, all from May 1995 before the lawsuit was filed, demonstrate that the religious service is listed with the graduation program – just as was the case after the lawsuit was filed in both 1996 and 1997. The court finds that the pending lawsuit made no difference to this intermingling of the private religious service with the school-sponsored graduation ceremony; the practice was the same in 1995 as in 1996 and 1997.

Mr. Chandler testified in his February 1, 1996 affidavit, "Since 1985, through the Fall of 1995, I have witnessed pre-football game prayer at Valley Head, and at Geraldine, Fyffe and Plainview games." (Apparently, Mr. Chandler was complaining about this practice even before the Eleventh Circuit had issued a ruling directly on point.) Mr. Chandler testified in this affidavit that Superintendent Weldon Parrish had told him that prayer at school football games was a tradition that would not be stopped. Mr. Chandler attached to his affidavit as Exhibit 7, an August 2, 1989 newspaper article quoting Superintendent Parrish as stating that school principals could have prayer over the loudspeaker at high school football games if they wished, in accordance with tradition, despite the Eleventh Circuit's ruling to the contrary. In paragraph 20 of its Amended Answer, the DeKalb County Board of Education admits that Superintendent Parrish had referred to prayer over the public-address system at high school football games as a tradition.[20]

Mr. Chandler testified in his affidavit that he wrote a letter of complaint to Superintendent Parrish on August 3, 1989 regarding the newspaper article of August 2, 1989 and the quotations attributed to school officials. The letter expresses Mr. Chandler's concern that school officials had expressed that they would disobey the law and asks Superintendent Parrish to "consider adopting [a] board policy stating that all employees will obey the law and respect the differences in religion that exist in this country." That letter is appended as Exhibit 9 to Mr. Chandler's affidavit and is authenticated in his affidavit. Mr. Chandler testified in his affidavit that he received no response. In their Amended Answer, paragraph 20, the DeKalb County Defendants "admit plaintiff Chandler wrote to Superintendent Parrish and the DeKalb County School Board expressing his concern over school sponsorship of religious activities." They also admit the "remaining allegations" of paragraph 20, which include the allegation that Mr. Chandler received no reply to his letter of complaint.

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[20] The court notes that "tradition" contemplates ongoing, repetitive conduct.

All of this undisputed evidence about events and practices before this lawsuit was filed, as well as the undisputed evidence of ongoing school-sponsored religious activities after the Parties made representations to the court through filing their Joint Motion and after the court's March 1997 Opinion and Order, indicate to the court that injunctive relief is necessary. DeKalb County has disregarded its representations to the court and the Plaintiffs, has ignored the obvious import of the court's March 1997 Opinion and Order, and has continued, in action repetitive of or similar to conduct before the lawsuit was filed, to: (a) permit mass vocal prayer in the classroom at Geraldine School, when the teacher announces the lunch period; (b) use the public-address system to deliver prayer and to call for prayer prior to high school football games at several schools; (c) offer student-led prayers at graduation ceremonies, among them prayers presented in the guise of "historian addresses" two years in a row; (d) offer student-led prayer at graduation that is decidedly Christian and therefore sectarian; (e) intermingle private religious service with official graduation exercises; and (f) refused to halt harassment based on religion where they have notice of it and to take effective action to deter violations by students, school officials, and nonschool persons.[21] The conduct is certainly recurrent, and almost certain to remain so absent an injunction.

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[21] *See* Exhibit A to Joint Motion; footnote 16 of court's March 1997 Opinion and Order.

This court has been besieged by motions and requests for clarification of its March 1997 Opinion and Order, which the court thinks sufficiently clear not only as to the court's ruling that Alabama's most recent school-prayer statute is facially unconstitutional, but as to all the case law demonstrating why that is so that has been controlling for some time. This court indicated in its March 1997 Opinion and Order that it rejected the Fifth Circuit's rule on student-initiated graduation prayer as inconsistent with *Lee v. Weisman* and with the Eleventh Circuit's holding, rationale, and opinion in *Jager v. Douglas County*. As recently as October 23, 1997, DeKalb County again requested "clarification" from the court as to whether the federal court "has the authority to tell school officials in DeKalb County how to handle the issue of school prayer."

Finally, the court notes that Plaintiffs have represented in several filings that they have on several occasions proffered a consent decree to the DeKalb County Defendants. (*See, e.g.*, Supplement to Motion for Sanctions and Opposition to DeKalb Defendants' Request for Time, ¶ 3 & n. 3.) The DeKalb County Defendants have consistently taken the position that the Plaintiffs' challenges to their specific practices would be mooted by the court's ruling on the statute. The DeKalb County Defendants' discovery responses take the position that challenged conduct was undertaken pursuant to the statute. (*See* DeKalb Defendants' Answers to Plaintiffs' First Set of Interrogatories, Responses 5, 9, 11 and 12, responding "Yes" to interrogatories inquiring whether this conduct, including a teacher's asking for student volunteers to pray was "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions.") The DeKalb County Defendants argued that summary judgment should be denied because the court's opinion on the statute would moot most if not all issues as to them. In other words, DeKalb argued that a facially unconstitutional statute would not shield it from constitutional violations avowedly undertaken pursuant to it, and that a ruling of facial invalidity would necessarily mean that myriad activities undertaken under the statute were unconstitutional. Accordingly, when the court struck the statute, it ordered DeKalb County, in conformity with DeKalb County's own expressed views, to sit down with the Plaintiffs and attempt resolution of nonfacial claims.

The response to court-ordered settlement discussions between the Plaintiffs and DeKalb County was still rejection of any settlement despite DeKalb's own argument that a facial ruling would be dispositive of other claims. It is apparent to the court from the evidence, and even from recent DeKalb County filings, that unconstitutional conduct will not be *willingly* stopped by elected school officials. The court notes this not to chide, but by way of explaining why it believes that DeKalb County school officials are unlikely to take steps to cause popular, but illegal, activity to cease. The court thinks it apparent from the long history of pregame prayer, from the admission that Superintendent Parrish believes it to be a tradition, and from the recent necessity of a conference call to discuss a high school principal's expressed views (at the request of his counsel on the representation that clarification of the March 1997 Opinion and Order was necessary), that court-ordered terms are the only means of relief.

If DeKalb County has specifically contended throughout this litigation that student-initiated prayer at football games, assemblies and events, and at graduations was done pursuant to the statute, and this court ruled in March 1997 that the statute was unconstitutional, at a minimum, this conduct pursuant to the statute should have ceased.

Where the court finds that state officials are unlikely to enforce theterms of a state statute that has been struck, it may order only declaratory relief and withhold injunctive relief.[22] Here, however, officials flagrantly defied the Eleventh Circuit rule on prayer over the public-address system and continued to do so after this lawsuit was filed. Here, even after this court's March 1997 Opinion and Order, "student-initiated" prayer continued with the use of the school facilities and in particular the public-address system.

In view of the history of pervasive religious activity in the schools operated by the DeKalb County School Board, the court determines that an injunction of the DeKalb County School Board is necessary. It is not in every jurisdiction that one hears of organized, school-sponsored prayer in the classroom more than three decades after *Schempp* and *Engel*. Yet here, according to

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[22] *See Gay/Lesbian/Bisexual Alliance v. Sessions*, 917 F. Supp. 1548, 1557-58 (M.D. Ala. 1996).

DeKalb's own discovery responses. stipulations, and Amended Answer, Jesse Chandler's teacher Ms. Carroll "may have selected devotionals for students to read," "asked for volunteers to lead prayers," and permitted prayer. (Stipulation 46; Amended Answer, 16.)[23] Moreover, after this lawsuit was filed, classroom prayer at Geraldine School has been videotaped, and the manner in which it proceeds is upon the teacher's announcement of the lunch period. (*See* Affidavit of Jim Melchiorre.) The manner in which it proceeds is out loud and in unison.

In view of this and the above, the court finds that the monitoring it orders by its injunction is appropriate and necessary. It has been demonstrated to the court's satisfaction that simple declaratory relief would, in DeKalb County, be no relief at all.

The court further finds that in-service training is warranted as a necessary component of injunctive relief. The evidence in the record indicates that school officials apparently see no error in failing to curtail organized classroom prayer; in allowing the public-address system to be used for prayer at school-sponsored sporting events; in allowing not only student-initiated prayer at graduation, but allowing explicitly Christian prayer at graduation ceremonies; and in failing to adopt a policy of uniform applicability for distribution of materials by nonschool persons that would have obviated the need of the court's ordering them to do so, even though the court admonished DeKalb County at the pretrial conference that the absence of such a policy is a serious matter. All of these things suggest to the court a disregard for the rights of students and parents who might not be members of the majoritarian religion or who might believe that the United States Supreme Court has correctly held for decades that the state may not favor religion, even over nonreligion.[24]

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[23] Admissions such as these support Plaintiffs' argument in their briefs that ostensibly "student-initiated" activities hazard the possibility that school officials will simply delegate religious activity to students, who act as their surrogates. On this basis alone, in conjunction with evidence such as this, a court could strike the statute or the practice under *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Most importantly, the court is disturbed by the uncontroverted testimony regarding Jesse Chandler. Even if Michael Chandler's November 10, 1996 Declaration testifying that all students are required to attend homeroom periods and that DeKalb County schools are closed-campus schools, so that students may not leave the campus during the school day without permission were controverted, this court still could not find that the lunchroom situation described in the June 9, 1997 Declaration at Fyffe School could continue. The court repeats what it said in footnote 16 of its March 1997 Opinion and Order: disruptive, aggressive, harassing speech by students, even in the lunch setting, is not protected. Michael Chandler's testimony that both the school principal and Superintendent Parrish had notice of the situation and replied that lunch time was "noninstructional" time so they would not intercede convinces the court of the need for brief, one-time-only, in-service training.

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[24] *See County of Allegheny,* 492 U.S. at 590-91; *Wallace v. Jaffree,* 472 U.S. 38, 60 (1985).

The court, by the terms of its injunction, leaves the selection of the curriculum to DeKalb County subject to the court's approval. While the court has suggested a program, its suggestion is for illustrative purposes only and the court would approve any reasonable program of neutral and objective content. All of the matters discussed above, as well as the matters discussed below with reference to the Plaintiffs' dispositive motions, demonstrate to the court that a one-time, in-service training would be of great benefit in clarifying the law for those who must abide by it. The court does not require such in-service training repetitively or for all new hires but requires merely that educational materials be maintained in a form accessible to persons who are hired after the court-ordered in-service training is conducted.

The court finds that this injunctive relief will clarify the law for agents of the DeKalb County School Board and that general instruction in the tolerance of religious diversity that underlies the Establishment Clause's proscription of religious favoritism is necessary and is frankly responsive to DeKalb County's oft-requested pleas for more clarification of the court's March 1997 Opinion and Order. The court expects such training to assist school officials in complying with the injunctive provision regarding school officials' treatment of situations such as Jesse Chandler's lunchroom incident.

The court finds that its provisions for publicizing its injunction are reasonable and not onerous.

The court finds that the nonharassment provision is a general aspect of injunctive relief in cases such as employment discrimination, where Defendants often control the destiny of suing employees and of their witnesses. The court finds the present situation analogous. The court finds that specific provision is warranted as to Jesse Chandler particularly by the fact of Jesse Chandler's experience at Fyffe School. The court finds that specific provision as to Mrs. Whiteside is likewise warranted due to gratuitous references in briefs and affidavits. The references in Donna Taheri's affidavit and Steve Bowman's affidavit, for example, appear to the court to suggest that these persons, DeKalb County Board of Education employees, have formed the opinion that Mrs. Whiteside is opposed to school prayer and therefore "trapped" Mr. Bowman into singing a gospel song at a school-sponsored assembly by requesting that he sing a song.

As to all references to Alabama Code Section 16-1-20.3 and any regulations implementing it, the court reiterates its conclusion of March 12, 1997 that the statute is unconstitutional as measured against both the Free Exercise and Establishment Clauses. The court expressly found that "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions" as referenced in the statute ran afoul of the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The court found state sponsorship and endorsement of religion in students' undertaking prayer, invocations, or benedictions using the state's facilities and machinery. Certain conclusions obviously flow from that; one is that conduct that fits the description of the unconstitutional statute is similarly unconstitutional. The court expressly so finds.

B. Evidence And Conclusions Upon Dispositive Motions

The court now focuses on the evidence specifically related to dispositive motions in this case, to the exclusion of evidence of continuing violations of law past the time of the filing of those motions, that the court has reviewed above and which demonstrate to the court that declaratory relief alone would be insufficient.

The court notes again that the DeKalb County Defendants have responded to Plaintiffs' interrogatories about devotionals at D.A.R.E. assemblies; faculty solicitation of student volunteers to lead classroom prayer; devotionals over the intercom; and graduation invocations by students, with the response that such activity was undertaken as "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (*See* Plaintiffs' First Discovery Request to DeKalb Defendants, Requests 5, 9, 11, 12; DeKalb Defendants' Answers to Plaintiffs' First Set of Interrogatories, "Yes" to Requests 5, 9, 11, 12.) The court notes again that it was DeKalb County's position at summary judgment that the court's ruling on the statute would resolve most of these challenges – the court finds that the only exception to this position taken by DeKalb County exists with regard to Gideon Bible distributions.

The court has reviewed the Parties' final filings in response to the court's April 24, 1997 Order from the bench as an aid to its findings, but these filings are aids only and may not reflect all admissible evidence. Findings follow:

1. Stipulations resolve some issues.[25] Thus the court finds that "[p]laintiff Michael Chandler is a resident of DeKalb County, Alabama and is the father of Jesse Chandler, a seventh-grade student born in 1983, who attends Fyffe School." (Stipulation 1.) The court further finds that "plaintiff Michael Chandler is an employee of the DeKalb County Board of Education who works at Valley Head School, where he teaches class and serves as assistant principal and as guidance counselor. In this capacity, plaintiff Michael Chandler is required to attend various school-related activities and events, including compulsory and non-compulsory school-related student assemblies, school-related sporting events, school-related graduation or commencement ceremonies and other school-related student events." (Stipulation 2.) The court further finds that Michael Chandler is required to attend home football games in his capacity as assistant principal

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[25] The court notes that its Order to the Parties to stipulate to such matters as they could among themselves, apparently produced delay and confusion due to the multiplicity of Parties. In ordering the Parties to stipulate to matters as to which admissions and agreement could be made, the court intended for Parties to use their common sense as to deciding to which Parties a given stipulation is obviously addressed. The court relies on stipulations between the Plaintiffs and DeKalb County for all matters directly affecting DeKalb County and factual allegations specific to it. The court notes that the Plaintiffs have not attempted reliance or attributed any evidentiary significance to the filings of the Governor in this regard. Nor does the court, which finds that the Governor may not contravene or qualify the Stipulations of DeKalb County by means of his own stipulations. The court notes that stipulations would be meaningless as among Parties intending to be bound by them if other Parties could effectively veto them.

at Valley Head High School. (Amended Answer, ¶ 19.) The court further finds that "[i]n his capacity as assistant principal at Valley Head, Michael Chandler is required to attend graduation/commencement ceremonies at the school." (Stipulation 56.)

2. The court finds that "[t]he DeKalb County Board of Education operates all public schools within DeKalb County, including Valley Head School, Plainview School, and Fyffe School, which schools have students in grades K through 12." (Stipulation 15.)

3. The court finds that "[a]ll DeKalb County high school home football games or other athletic events take place under the general direction or control of the DeKalb County Board of Education, with individual games occurring under the immediate supervision of each home-team principal. All home football games and other athletic events take place on public school-owned or leased property. Public school officials or their agents control access to the public-address systems at all football games or other athletic events, including granting permission for its use." (Stipulation 51.) The court finds that "[i]n 1994 and 1995, prayers and devotionals, as well as the Pledge of Allegiance, have been offered over the public-address system by students and clergy at DeKalb County high school football games." (Stipulation 53; *see also* Stipulation 55.)

4. The court finds that "graduation/commencement exercises are school-sponsored events for which school principals and other school officials make the ultimate decisions as to the format of the ceremony." (Stipulation

58.) The court further finds that "[t]he graduation/commencement ceremony is considered an integral part of the school educational program and of each student's tenure at school. Graduation/commencement ceremonies are community-wide events frequently attended by non-graduating students." (Stipulation 60.)

5. Exhibit B to the Plaintiffs' Motion to Enforce Voluntary Cessation Agreement, filed November 21, 1996, is a videotape accompanied by a Declaration under Penalty of Perjury of Michael Chandler executed November 10, 1996. The videotape depicts graduation prayer over the public-address system filmed by Mr. Chandler which occurred prior to the filing of this lawsuit and also depicts pre-game prayer over the public-address system at a Valley Head football game that occurred prior to the filing of this lawsuit, on September 1, 1994, according to the uncontroverted affidavit of Michael Chandler. (*See* and *compare* Aff. of Michael Chandler, ¶¶ 6, 9; Ex. B to Plaintiffs' Motion to Enforce, Nov. 21, 1996; Plaintiffs' Designation of Exhibits filed Nov. 21, 1996, n. 4; Compliance with Court's Order from the Bench of April 24, 1997 to Point out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff ("Exhibit B to Plaintiff's Motion to Enforce, filed November 21, 1996, shows Leslie Sexton, Geraldine High School Student Council President, leading the prayer over the public-address system at an October 1996 football game and also shows a September 1994 pre-game prayer at Valley Head High School").)[26]

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[26] Exhibit B to the Plaintiffs' Motion to Enforce further depicts a pre-game prayer that Michael Chandler has testified

6. The court finds that the evidence is uncontroverted that "over the past year,[27] students have lead [sic] the crowds in prayer at certain high school football games in DeKalb County over the public-address system." (Amended Answer of DeKalb County, ¶ 18.) Specifically, Mr. Chandler testified in his February 1, 1996 affidavit that prayer occurred from 1985 through 1995 at his "home" school of Valley Head, as well as at Geraldine, Fyffe, and Plainview games. In Stipulations 53 and 55, DeKalb County admits that such prayers over the public-address system have been had. In addition to the admission in DeKalb County's Amended Answer, the court relies upon Stipulation Numbers 51 and 53, in which it is admitted that the DeKalb County Board of Education, and also school principals, have immediate supervision and control over "home" athletic events and the public-address system and admitted that prayers and devotionals "by students and clergy" were offered in 1994 and 1995 over the public-address system.[28]

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occurred on October 19, 1996, after this lawsuit was filed. (*See* and *compare* Aff. of Michael Chandler, ¶¶ 6, 9; Ex. B to Plaintiffs' Motion to Enforce, Nov. 21, 1996; Plaintiffs' Designation of Exhibits filed Nov. 21, 1996, n. 4; Compliance with Court's Order from the Bench of April 24, 1997 to Point out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff ("Exhibit B to Plaintiff's Motion to Enforce, filed November 21, 1996, shows Leslie Sexton, Geraldine High School Student Council President, leading the prayer over the public-address system at an October 1996 football game and also shows a September 1994 pre-game prayer at Valley Head High School").

[27] Meaning the year preceding filing of the lawsuit.

[28] The court concludes that *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (1989), *cert. denied*, 490 U.S. 1090 (1989), is

7. The court notes that the DeKalb County Defendants, in their Amended Answer, "admit the first sentence of paragraph 22." The first sentence of paragraph 22 of the Complaint alleges that "[t]he graduation services held in each of DeKalb County's eight high schools regularly incorporate religious invocations and/or benedictions." The DeKalb County Board of Education has not denied the allegations of paragraph 22 of the Plaintiffs' Complaint, with reference to invocations and benedictions generally and to clergy-led prayer at Crossville High School. The court finds that in May 1995, a prayer at the graduation ceremony of Crossville High School was led by the Reverend Bob Coleman. (Exhibit 1 to February 1, 1996 Affidavit of Michael Chandler; Complaint, ¶ 22; Amended Answer, ¶ 22.) The court finds that an invocation was given by student Heather Elaine Clowdus at

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totally dispositive of the prayers delivered over the public-address system, regardless of whether student- or clergy-led. "When religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school or facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation." *Jager,* 862 F.2d at 831-32. *See also Nartowicz v. Clayton County Sch. Dist.,* 736 F.2d 646 (11th Cir. 1984) (finding no meaningful distinction between school officials themselves committing the Establishment Clause violations and permitting students to do so). Pursuant to *Lemon v. Kurtzman,* 403 U.S. 602 (1971), this is a message that the school may not convey. *See also Jager,* 862 F.2d at 832 (stating that persons of any age may find that state endorses religion and specifically religion believing in prayer thereby denigrating the beliefs of others in violation of Establishment Clause where the school's facilities are used for prayer).

Plainview High School May 26, 1995 and that an invocation and a benediction were given by students Chad Willis and Zack Smith at Collinsville High School's May 1995 commencement. (Exhibit 3 to February 1, 1996 Affidavit of Michael Chandler.) An invocation was also given at the May 1995 Fyffe High School commencement by a student. (Exhibit 5 to February 1, 1996 Affidavit of Michael Chandler.)

Exhibit B to the Plaintiffs' Motion to Enforce depicts various graduation prayers, as earlier stated. The DeKalb County Defendants contend in this lawsuit that student-led graduation prayers are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (Plaintiffs' First Discovery Request to Defendants, Interrogatory 9; DeKalb Defendants' Answers to Plaintiffs' First Set of Interrogatories, Response to Interrogatory 12.) The court finds this to be expressly true of the May 1995 Valley Head student invocation addressed by Stipulation 63 and Plaintiffs' Interrogatory 12 and that DeKalb's response extends to "such prayers" elsewhere.

The language is that of Alabama Code Section 16-1-20.3, and DeKalb has contended throughout this lawsuit, at summary judgment and elsewhere, that it has permitted such conduct under the auspices of the statute. There is no evidence to the contrary in the record. The court finds that the Plaintiffs and DeKalb County have stipulated to the fact that "[g]raduation/commencement exercises are school-sponsored events for which school principals and other school officials make the ultimate decisions as to the format of the ceremony." (Stipulation Number 58. *See also* Amended Answer of DeKalb County,

¶ 21.) The court finds that the Defendants admit that the May 1995 Crossville High School graduation featured a clergy-led invocation. (Amended Answer, ¶ 22. *See also* Exhibit 1 to February 1, 1996 Affidavit of Michael Chandler.)

Exhibit B to the Plaintiffs' Motion to Enforce depicts various graduation prayers, as earlier stated. There is no evidence to the contrary in the record. The court further finds that the Defendants admit that the May 1995 Crossville High School graduation featured a clergy-led invocation.[29] (Amended Answer, ¶ 22. *See also Exhibit* 1 to February 1, 1996 Affidavit of Michael Chandler.) The court further finds that even if clergy-led prayer occurred but one time,[30] the DeKalb County Board of Education would have no defense to this constitutional violation.[31]

The court concludes that student-led prayer at graduation is unconstitutional as the court understands Eleventh Circuit law and Supreme Court precedents. The court has already declared Alabama Code Section 16-1-20.3 unconstitutional. This federal district court does not judge it to be its province to adopt for Alabama a rule applicable to graduation prayer in another appellate circuit which does not include Alabama, especially where the court finds that rule to be in direct conflict with *Lee v. Weisman* and inconsistent with *Jager* in our own Circuit. As the court stated in footnote 4 of its March 1997 opinion, "the Court believes that the decision in *Jones II*[32] is a departure from established Supreme Court precedent" and is "inconsistent with controlling Eleventh Circuit precedent." The court further noted in footnote 4 that *Jones II* rested on questionable legal conclusions, did not sweep as far as Alabama Code Section 16-1-20.3, was "aberrational" among the existing Supreme Court and federal appellate cases, and was of limited relevance to the case before it.

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[29] The clergy-led prayer is proscribed by *Lee v. Weisman*, 505 U.S. 577 (1992), even if nonsectarian.

[30] The court notes that it occurred in May 1995, after *Lee v. Weisman* was decided and after *Jones II* was decided in the Fifth Circuit. Even *Jones II* does not countenance clergy-led prayer.

[31] The United States Supreme Court and the Eleventh Circuit have held unavailing the argument of school boards that unconstitutional practices may be justified as "relatively minor encroachments on the first amendment. The breach of neutrality [toward religion] that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' " *Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963); *Jager*, 862 F.2d at 832.

The court concludes that *Lee v. Weisman* proscribes even indirect coercion by state officials to pray.[33] The court concludes that, whether pursuant to a statute mandating school officials to permit "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions"[34] or not, *Lee v. Weisman* teaches that the state, even when not officially delivering the prayer, may be effectively coercing students who do not wish to hear or participate in prayer to do so by sponsoring prayer at graduation. Under *Lee,* the fact that attendance at graduation ceremonies is not required to obtain a diploma is irrelevant.[35]

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[32] The court refers to *Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993).

[33] *Lee*, 505 U.S. at 599; *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962); *Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 224-25 (1963).

[34] *See* Plaintiffs' Interrogatory 12 and DeKalb County's Response, "Yes."

In the Eleventh Circuit, pursuant to *Jager,* "when religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school or facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation."[36]

The court finds and concludes that commencement is "a school-sponsored event at a school or facility" as stipulated by the parties. Within the meaning of *Jager* in this context, such a "religious invocation conveys a message that the school endorses the religious invocation." The court finds that the United States Supreme Court made sufficiently plain in *Lee* that even nonsectarian prayer is proscribed.[37] The court further finds and concludes that nothing in these cases interferes with, for example, a valedictorian's expressive right to make a brief reference to Deity in a valediction.[38] The court concludes that these cases touch in no way upon purely private, voluntary religious expression and that the proscription on school-sponsored prayer has no connection to prayer at baccalaureate services or similar events.

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[35] *See also Schempp,* 374 U.S. at 226; *Engel,* 370 U.S. at 430.

[36] *Jager,* 862 F.2d at 831-32. *See also Nartowicz v. Clayton County Sch. Dist.,* 736 F.2d 646 (11th Cir. 1984) (finding no meaningful distinction between school officials themselves committing the Establishment Clause violations and permitting students to do so).

[37] *Lee,* 505 U.S. at 588-89. Sectarian prayer is obviously proscribed by the Establishment Clause, as cases such as *Larsen v. Valente* make clear. Here, the court encounters the anomalous situation of a school board claiming that student-led prayers, some of which are explicitly Christian as depicted on videotape and according to uncontroverted testimony, are "nonsectarian" – because the school board has claimed the statute authorizes

9. The court has, as noted earlier, examined all documents filed with the Affidavit of Michael Chandler of February 1, 1996, several of which consist of official, school-generated programs for DeKalb County commencement exercises as to which authenticity was admitted by the DeKalb Defendants in the course of discovery. (Defendants' Response to Plaintiffs' Request for Admissions, numbers 1-12, filed in various pleadings including Compliance with Court's Order from the Bench of April 24, 1997 to Point Out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff.) Exhibit 3 to this Affidavit demonstrates that the baccalaureate service of May 21, 1995 was printed on the same program as the commencement exercise at Plainview High School and that Plainview principal Bob Gray introduced the baccalaureate service. Exhibits 5 and 6 to this Affidavit indicate that the Fyffe High School and Collinsville High School's 1995 commencements were

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the activity. Obviously, graduation services, as the Parties have agreed, are not private time; they are school-sponsored events. To that extent, audiences may not be led in "sectarian" prayers, either.

[38] *See In re Gault*, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

printed on the same program as the baccalaureate services and that at Fyffe High School, principal Nelson Ellis introduced the baccalaureate service. The same is true of various 1996 programs authenticated by the DeKalb County Defendants as to programs doing double duty and showing involvement of school officials. (*See, e.g.*, 1995 program for Plainview High School, showing that principal Billy Ray Morris participated in 1995 baccalaureate program, authenticated in response to Plaintiffs' Request Number 15; Plainview High School "Thirty-Seventh Commencement Exercises" (1995), showing that principal Gray participated in baccalaureate, authenticated in response to Plaintiffs' request Number 20.)

By this observation, the court does not mean to imply that school officials may not *attend* baccalaureate functions, only that they should not, i.e., introduce ministers or lend the aura of school sponsorship to the private religious enterprise. They may not, likewise, as evidenced in Exhibit 2 to the February 1, 1996 Affidavit of Michael Chandler, excuse students from class for baccalaureate practice.[39]

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[39] Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), state actions that fail any one of the three prongs of that test are unconstitutional. The commingling of the private religious commemoration, which is understood to be that, with school graduations is impermissible. School sponsorship, including excusing students from class for baccalaureate practice, is impermissible. The primary effect of such actions is to endorse religion and to convey the message that school officials favor religion.

10. Michael Chandler's November 10, 1996 Declaration stated that all students are required to attend homeroom periods and that DeKalb County schools are closed-campus schools, so that students may not leave the campus during the school day without permission. Nowhere in the record is this testimony controverted in such a way as to rob it of legal relevance.

The court finds that instructional time is not, as urged by DeKalb County, all time not devoted to academic instruction. For purposes of the Establishment Clause, the court does not look to the curricular or teaching-hour requirements that an accreditation agency might look to; rather, it looks to whether children are required to be present during a particular time. The concern is with the captive-audience problem, not with pedagogical matters. Thus, when Fyffe School fifth-grade teacher Brenda Powell testified in her affidavit that the Gideon Bible distribution of which she spoke "did not take away from the instructional time," the court cannot ascribe legal relevance to that testimony. The court notes that her additional testimony that "[c]ustomarily, a Gideon representative would come in to the classroom during the homeroom period, before classes began and during non-instructional time" amplifies the misunderstanding of the DeKalb Defendants as to the meaning and importance of "instructional time" for Establishment Clause purposes. (*See* Affidavit of Brenda Powell, executed October 30, 1996.)

The court finds that the question of what is "instructional time" for Establishment Clause purposes is a legal question for the court, and it resolves this question with reference to the facts and holding of *Schempp*, 374 U.S. 203

(1963), which it believes dictates that time not being used for actual pedagogical instruction is nonetheless not free time for students and is instead compulsory time in a setting in which attendance in "homeroom period" is required.[40]

The court notes that Ms. Powell teaches at Fyffe School and that her own testimony established that Gideons "customarily" came into her classroom "during the homeroom period." The court having concluded that this is "instructional time" for the purpose of evaluating what is proscribed by the Establishment Clause, does not linger long over the conclusory testimony of Fyffe School principal James Danny Ashley about what is instructional versus noninstructional time. Michael Chandler testified in his February 1, 1996 Affidavit, "From what I have observed over the years, the Gideons distribute Bibles to the fifth-grade students and to the twelfth-grade students." Michael Chandler testified that Gideon representatives entered and addressed Jesse Chandler's class, and Ms. Powell's affidavit confirmed that the Gideons were allowed to make a presentation. Mr. Chandler and Mr. Ashley agree that Mr. Ashley escorted the Gideon representatives to the class.

Principal Ashley, like Mr. Chandler, testified in his affidavit executed October 30, 1996 that Gideon representatives distribute Bibles in the classrooms of the fifth and twelfth grades. Mr. Chandler testified in his February 1, 1996 affidavit that he refused to permit Gideon Bible distributions at Valley Head in November 1994 but that they occurred elsewhere. Mr. Ashley testified that the Gideons "have always" passed out Bibles during homeroom but contrarily testified to an occasion "recently" when "the Gideon representatives were late in getting the Bibles to the 12th grade classes and I took them to a 5th grade class." Elsewhere in his affidavit, Mr. Ashley again reiterated that Gideon Bibles have been distributed in the classroom. The affidavit of Bill Ayers executed October 30, 1996 establishes that for the 16 years he has been a fifth-grade teacher at Plainview School, the Gideons have been distributing Bibles "the entire time I have been there." The DeKalb County Defendants' response to Plaintiffs' Request for Admission Number 15 admits that the Gideons passed out Bibles in Ms. Whiteside's classroom during the homeroom period at Plainview School.

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[40] In *Schempp,* Bible readings *opened the school day;* the practice was struck as unconstitutional. *See also Berger,* 982 F.2d 1160, 1171 n. 6 (7th Cir. 1993), *cert. denied,* 508 U.S. 911 (1993).

Mr. Ayers testified that "[t]hrough the years, the method of distributing the Bibles may have changed" and like Ms. Powell and Mr. Ashley, offered his legal conclusion as to what is instructional time. He testified that such distributions have been made during homeroom period and that students "have considered [a Gideon Bible], like many other things they obtain through school, a souvenir, and all students generally wanted the Bibles." He also testified that "for the last school year" at Plainview, the Bibles were left in the lunchroom or the principal's office for students to retrieve them as they wished but that classroom distributions "for the last school year" did not occur.

Mr. Ashley testified in his affidavit that the "policy at Fyffe School is to allow community persons and organizations to distribute information in the school." He testified that *he* permitted announcements and distributions of materials. He testified that "this past year, the Bibles were distributed by Gideon representatives standing on the public sidewalk and not on school property." The various affidavits of Mr. Ayers, Mr. Ashley, and Ms. Powell indicate that policies vary widely from school to school, and that the school officials at Plainview after the lawsuit was filed differ from the policies implemented at Fyffe.

The affidavit of Superintendent Parrish again offered a legal conclusion about instructional time that the court has rejected. However, the affidavit makes plain to the court that there is a reason for the divergent treatment of the Gideon distributions: "There is no formal, written policy concerning this, but the general policy is that with the individual school principal's permission, said information is permitted at various times at the schools."

Therein lies the crux of the problem, as the court informed DeKalb County counsel at the pretrial conference in April. Still no policy of uniform applicability was adopted. Jesse Chandler therefore remains subject to the Gideons entering the classroom when he is in twelfth grade, because there is no policy proscribing it.

The court recognizes that sidewalks and streets in front of public schools have been held to be public fora.[41]

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[41] *See Police Dep't of City of Chicago v. Mosley,* 408 U.S. 92 (1972).

The classroom is not traditionally a public forum.[42] The court notes that in the *Berger*, the defendants relied upon *Widmar v. Vincent*, 454 U.S. 263 (1983) and *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), for the proposition that where a school opens its doors to one group, it cannot discriminate against any group. However, the *Berger* court correctly focused on the fact that those cases are distinguishable on the basis of the Equal Access Act.[43] The *Berger* court noted that in those cases the religious organization claiming discrimination sought access to empty school classrooms only, after the school day was over. In *Berger*, the Gideons' access was to the students, an audience. As the *Berger* court observed, "A designated public forum is a place. Children, of course, are not."[44] The Seventh Circuit found that students are essentially a captive audience under the control of their teachers.[45]

The court is not persuaded that a limited public forum has been created in regard to classroom distributions or that it could be with regard to classroom distributions. The court agrees with the *Berger* court that children are not a place and hence finds the classroom distributions here violative of the Establishment Clause. As the *Berger* court stated, "a public school cannot sanitize an endorsement of religion forbidden under the

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[42] *See, e.g., Lamb's Chapel v. Center Moriches Union Sch. Dist.*, 508 U.S. at 392.

[43] The Equal Access Act applies only to secondary schools. 20 U.S.C. § 4071(a).

[44] *Berger*, 982 F.2d at 1167.

[45] *Id.* at 1168.

Establishment Clause by also sponsoring non-religious speech."[46] The court finds that the same is true of classroom distributions here.

The court does not wish by the terms of its injunction to discriminate against the Gideons International. The court does not intend by its injunction to single out the Gideons for discriminatory treatment or to infringe upon their free-speech rights. By the same token, the court is disturbed by the absence of uniform regulation by school officials and the "gap" this leaves in the delicate area of the interplay between the rights of nonschool persons and students. It is for this reason that the court's injunction makes reference to the location of students. The court takes it as a simple truism that, where the public schools are concerned, adult nonschool persons cannot harass or act aggressively toward students in regard to distributing *any* materials, religious or otherwise. Such conduct would not be reasonable in time, place and *manner.*

The court assumes that distributions by any and all nonschool persons can and shall be governed by a uniform policy of general applicability in all DeKalb County public schools. By ordering this in its injunction, the court does not mean to encumber ordinary discretion on the part of school principals. However, given the divergent practices to which school officials have testified, the court finds that a single, uniform policy adopted by the DeKalb County Board of Education must establish parameters for school principals so that the Establishment Clause is not violated.

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[46] *Id.*

The court will, upon adoption of such a policy by the DeKalb County Board and its approval by the court, modify its injunction to reflect the terms of the policy and to evidence the fact that the court has approved the policy. As reflected in its injunction, the court is disposed to view this policy-making task as the responsibility of the DeKalb County School Board and does not plan to sit as a scrivener over that process or to foist a policy of its own making upon the school board. A reasonable, constitutional policy will be approved and at that time the injunction can be modified to embody only the reasonable time, place and manner restrictions of the policy.[47]

12. Michael Chandler testified in his affidavit that prayer in Ms. Carroll's classroom and Ms. Carroll's selection of students to lead prayers occurred over the course of several years, including in 1995. Mr. Chandler testified that Ms. Carroll was one of Jesse Chandler's teachers in both fifth and sixth grades and that her classroom practices regarding prayer and religious activity were substantially similar in the 1993-94 and 1994-95 school years.[48] He testified that in 1995, Ms. Carroll read from her Bible to the class and selected devotionals for students to read.

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[47] The court ordered "immediate" distribution of its injunction to the Gideons for two reasons: it is early in the school year yet, and the board has been ordered to promulgate a policy in a short period of time. The court contemplated that the DeKalb County School Board might feel the need to confer with Gideon representatives about policies in place in other school systems that might satisfy constitutional criteria.

[48] At the time the Complaint was filed, Jesse Chandler was a seventh grader at Fyffe School. Complaint, ¶ 2.

The Defendants put forward no testimony from Ms. Carroll. In paragraph 16 of their Amended Answer, the DeKalb County Defendants admit that Ms. Carroll allowed student volunteers to pray in front of the class. In stipulation 46, the DeKalb County Defendants "admit that Ms. Carroll asked for volunteers to lead prayers. Defendants also admit that Ms. Carroll read aloud from the Bible, and "may have selected devotionals for students to read." The Plaintiffs asked the DeKalb Defendants in discovery, "In paragraph 46 of the DeKalb Defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, 'Defendants admit that Ms. Carroll asked for volunteers to lead prayers.' Do the DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions'?" The Defendants responded, "Yes."

The court concludes, as it concluded in its March 1997 Opinion and Order, with reference to the statute, that such practices are unconstitutional regardless of whether the practices are ostensibly "voluntary" or "student-initiated" and regardless of whether prayers are nonsectarian or students may be excused from the classroom.[49] The court finds that such classroom practices need not involve direct coercion in the form of a legal penalty or sanction in order to offend the Establishment Clause.[50] The court further finds that it should be clear that activities such as those admitted by DeKalb County have been squarely governed by *Engel* and *Schempp* for some 35 years.

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[49] *Engel v. Vitale,* 370 U.S. 421, 423-24 (1962); *Schempp,* 374 U.S. at 224-25; *Lee,* 505 U.S. at 599; *Ingebretsen v. Jackson Pub. Sch. Dist.,* 88 F.3d 274, 279 (5th Cir. 1996), *cert. denied,* 117 S. Ct. 388 (1996); *ACLU v. Black Horse Pike Regional Bd. of Educ.,* 84 F.3d 1471, 1479-80 (3d Cir. 1996); *Herdahl v. Pontotoc County Sch. Dist.,* 887 F. Supp. 902, 908 (N.D. Miss. 1995); *Gearon v. Loudon County Sch. Bd.,* 884 F. Supp. 1097 (E.D. Va. 1993).

That said, the court further concludes that the teaching of *Schempp* is also that the Bible may be studied for its literary and historic qualities and that "such study of the Bible, when presented objectively as part of a secular program of education" is constitutional. This is distinct from reading devotionals from the Bible absent academic content.

13. The Plaintiffs allege that prayers and devotionals have taken place at school-sponsored assemblies and events and over the school intercom. The court has already addressed scriptural readings and use of religious texts where part of a course of study in its March 1997 Opinion and Order. The DeKalb Defendants specifically admit that student-led devotionals have taken place at Plainview School. (Stipulation 50.) They contend that these devotionals are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (DeKalb Defendants' Answers to Plaintiff's First Set of Interrogatories, Number 11.) The DeKalb Defendants more specifically contend that such a "devotion"[51] offered at D.A.R.E. ceremonies and events are

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[50] *Lee*, 505 U.S. at 592-95.

[51] DeKalb Defendants' [Supplemental] Responses to Plaintiffs' First Discovery Requests, Number 5.

"non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (DeKalb Defendants' Answers to Plaintiff's First Set of Interrogatories, Number 5. *See also* Stipulation 30.) This is the language of Alabama Code Section 16-1-20.3 which this court has previously found to be unconstitutional.

The Plaintiffs further allege that Jesse Chandler attended a D.A.R.E. "graduation" ceremony at Fyffe School on May 18, 1994 at which a student gave a Bible reading and a devotional. The Plaintiffs also allege that in December 1995, the D.A.R.E. ceremony also included prayers and a devotional message as well as teacher-led religious singing. (The Plaintiffs evidently refer to two separate D.A.R.E. events, and the Defendants only to one in the Complaint and Amended Answer.) The court notes that paragraph 26 of the Complaint alleges that the Reverend Graham of Nazareth Baptist Church was invited to speak at the Valley Head D.A.R.E. program in 1994. The Plaintiffs allege that the Reverend Graham quoted from the Bible during his speech. The Defendants admit that the Reverend Graham made references to scripture. (Amended Complaint, ¶ 26.)

All fifth-graders in DeKalb County schools do participate in the D.A.R.E. program. (*See* Stipulation 28.) In Stipulation 30, DeKalb County states, "DeKalb defendants admit that two students volunteered to give words of inspiration at the D.A.R.E. graduation program at Fyffe School on May 18, 1994." The Defendants' response to Plaintiffs' Stipulation 30 that the D.A.R.E. 1995 graduation ceremony included student-led prayers and devotionals as well as the singing of a religious song by a teacher was not specifically denied as to prayers and devotions, and it was admitted that a teacher sang a song.

DeKalb also authenticated a program for its May 18, 1994 Culmination Program at Fyffe School which indicates that D.A.R.E. is at least in part sponsored by the DeKalb County Schools. The record indicates that the discovery response authenticating the document was served on Plaintiffs' counsel October 10, 1996. DeKalb also stipulated, in September 1996, that the D.A.R.E. program is "operated and managed by the DeKalb County Board of Education and daily administered and managed by Donna Taheri, an employee of the DeKalb County Board of Education." (Stipulation Number 27.)

On October 30, 1996, with Plaintiffs' dispositive motions pending, the DeKalb Defendants tendered the affidavit of Donna Taheri again invoking the phrase "words of inspiration" and apparently disavowing any state action inasmuch as she testified that D.A.R.E. is a program of law enforcement, not a school-run program. While she testified to her opinion that student devotionals are merely inspirational, not religious, and to her recollection that "there has never been a religious activity at any description at a D.A.R.E. graduation ceremony," her own testimony elsewhere in her affidavit is that some students at D.A.R.E. graduation ceremonies gave Bible readings.

Similarly, in Interrogatory Number 11, the Plaintiffs ask: "In paragraph 50 of the DeKalb defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, 'Defendants admit that student-led devotionals have taken place at Plainview School.' Do the

DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions'?" DeKalb responded, "Yes."

Since all of the Parties, as well as the Court, appear to be of the opinion that a "devotional" is a religious exercise, that falls within the category of "prayer, invocations and/or benedictions," and the Court finds that for the same reasons it has found that under established United States Supreme Court precedent that vocal prayers led by students in the classrooms are unconstitutional, student-led "devotionals" are similarly unconstitutional.[52] This applies to devotionals at Plainview as well as to devotionals at school-sponsored events, such as D.A.R.E. events.

The court's findings about the religious nature of devotionals, and the conclusion that D.A.R.E. is a school-sponsored activity, compel the conclusion that use of state facilities, including the intercom, for these religious messages is a violation of the Establishment Clause. The court is not persuaded that anything in the Defendants' affidavits, moreover, establishes any *de minimis* exception to the establishment clause. *Schempp*'s admonition that no breach is trivial controls the court's analysis.

The court finds that based on the Defendants' affidavits, devotionals and prayers occurred at Plainview

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[52] *See Engel*, 370 U.S. at 423-24; *Schempp*, 374 U.S. at 224-25; *Lee*, 505 U.S. at 599.

School. The court specifically finds that DeLayne Etherton's affidavit establishes that on Veterans Day 1995, a prayer occurred at the conclusion of a student message. The court also finds that prayer is not mere ceremonial Deism of the sort contemplated by the "in God we Trust" motto on our currency. Accordingly, the court cannot find that prayer should occur on ceremonial occasions such as Veterans Day or any other of the numerous holidays celebrated in the public schools. Nor does the court find any justification for prayer over the intercom as a gesture of patriotism. Indeed, numerous Supreme Court cases counsel against tying religion to patriotism and obviously, against identification with the state. The court concludes that there is neither a *de minimis* nor a "national crisis" exception to the establishment clause. *See generally, Lynch v. Donnelly,* 465 U.S. 668 (1984).

Order

Based on the foregoing, it is hereby CONSIDERED and ORDERED that:

(1) Plaintiffs' November 6, 1997 Motion To Enjoin Proceedings In The Etowah County Circuit Court, be and the same is hereby DENIED AS MOOT.

(2) Plaintiffs November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Permanent Injunction be and the same is hereby GRANTED. The "Findings Of Fact And Conclusions Of Law," upon which the court based its October 29, 1997 Permanent Injunction, are articulated herein.

(3) In addition and in the alternative to GRANTING Plaintiffs' November 10, 1997 Motion To Alter Or Amend: Pursuant to Federal Rule of Civil Procedure 60(a), this Supplemental Opinion and Order, and the "Findings Of Fact And Conclusions Of Law" articulated herein shall be and the same are hereby considered issued concomitantly with the court's October 29, 1997 Permanent Injunction *nunc pro tunc.*

(4) The court's Memorandum Opinion and Order, issued concomitantly, on this date, with this Supplemental Opinion and Order, shall be and the same is hereby INCORPORATED BY REFERENCE into this Supplemental Opinion and Order.[53]

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[53] In its Memorandum Opinion and Order, the court grants Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment. The court finds the granting of this motion, and the findings of fact and conclusions of law articulated therein, to be an integral, although not dispositive, portion and basis of its "Findings Of Fact And Conclusions Of Law" articulated in this Supplemental Opinion and Order, supporting its October 29, 1997 Permanent Injunction. Many of the findings of fact in each document are repetitive, however, the court's Memorandum Opinion and Order more clearly articulates those facts that are uncontroverted or which are clearly established for purposes of resolution of dispositive motions.

The two documents issued on this date are meant to be read concurrently, although each is fully supportable on its own. When the two documents issued on this date are read concurrently with the court's March 1997 Memorandum Opinion and Order and the October 29, 1997 Permanent Injunction, one can easily discern the full factual and legal basis for the court's injunction.

(5) The court's October 29, 1997 Permanent Injunction shall remain in full force and effect pending an Order from the Eleventh Circuit Court of Appeals or the issuance of a subsequent Order from this court upon due consideration of the Defendant Attorney General's "Motion For Partial Stay Of Permanent Injunction" filed November 10, 1997.[54]

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[54] The court notes that its October 29, 1997 Permanent Injunction merely **PROHIBITS THE STATE FROM COERCING RELIGIOUS PRACTICES OR PROMOTING ONE TYPE OF RELIGIOUS ACTIVITY OR VIEWPOINT OVER ANOTHER.** Indeed, the court's Permanent Injunction and March 1997 Opinion and Order goes to great lengths to articulate the activities permitted in public schools under the First Amendment to the United States Constitution as interpreted by the United States Supreme Court and the Eleventh Circuit Court of Appeals. Indeed, the DeKalb County school board, amongst others, noted the clear and distinct guidelines regarding permissible religious activity in public schools that the court's Orders provided educators and the public. As the court's previous Order's disclose, the First Amendment clearly protects personal religious activity and beliefs. At the same time, it clearly prohibits state initiation or promotion of religious activity or beliefs. School officials are arms of the state, and must abide by the requirements of the First Amendment.

The First Amendment requires that states "pursue a course of complete neutrality toward religion." *Jager v. Douglas County School Dist.*, 862 F.2d 824, 828 (11th Cir. 1989) (citing *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985)). State initiated or sponsored actions that utilize one type of religious activity over another necessarily "promote" that type of activity over others. As the court's March 1997 Opinion and Order notes: "It was devout religious conviction which led many colonists to leave England and settle in America. Unwilling to suffer the state-sponsored Church of England, many settlers came to this country in search

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of the right to freely exercise their religious beliefs – to be free from state-established religion." (March Op. and Order at 3 (citing *Engel v. Vitale,* 370 U.S. 421, 434 (1962).)

The right to be free from state-established religion lies at the heart of the concept of "freedom of religion" embodied in the First Amendment to the United States Constitution. *Lee v. Weisman,* 505 U.S. 577, 591 (1992). When the state forces school-children to pray, or coerces participation in religious activity, it infringes on school-children's freedom of religion in violation of their rights under the First Amendment. *See Jaffree,* 472 U.S. at 49 (noting that the Fourteenth Amendment "imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power"). For example, the state may not force Christian, Jewish, Buddhist, Baptist, atheist, or agnostic schoolchildren to participate in Muslim religious activities, just as the state may not force Muslim, Jewish, Buddhist, Baptist, atheist, or agnostic schoolchildren to participate in Christian religious activities (the court utilizes these viewpoints for exemplary purposes only – under the First Amendment, each individual is entitled to their own beliefs, free from state intrusion).

Regardless of whether state officials and school boards believe that a particular religious viewpoint is the "correct" viewpoint, the concept of "freedom of religion," embodied in the First Amendment, means that each person is entitled to choose their own religious beliefs and practices WITHOUT INTERFERENCE OR INFLUENCE FROM THE STATE. *See Jaffree,* 472 U.S. at 52 ("the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority"). Freedom of religion necessarily includes freedom *from* religion. *Id.* at 53 ("the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"). Contrary to the misstatements, hyperbole, and speculation surrounding the court's injunction and March 1997 Opinion and Order, the court's Permanent Injunction DOES

DONE this the 12th day of November, 1997.

/s/ Ira DeMent
UNITED STATES
DISTRICT JUDGE

NOT restrict schoolchildren's First Amendment rights – *it actually protects those rights from unwarranted and unconstitutional interference from the state.*

Michael CHANDLER, et al., Plaintiffs,
v.
Fob JAMES, et al., Defendants.

No. CV 96-D-169-N.

United States District Court,
M.D. Alabama,
Northern Division.

Nov. 12, 1997.

MEMORANDUM OPINION AND ORDER[1]

DE MENT, District Judge.

The court finds it necessary to vacate the portions of its October 31, 1997 Order denying as moot Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment. All other aspects of the court's October 31, 1997 Order shall remain in full force and effect. For the following reasons, the court finds that Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment is due to be granted. The court previously granted leave for Plaintiffs to file their Motion For Partial Summary Judgment out of time.

The Plaintiffs have brought several closely related claims in this lawsuit. First, in Count One, they challenged Alabama Code section 16-1-20.3 as violative of the

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[1] The court retains jurisdiction over this action during the pendency of Plaintiff's Rule 59 Motion. *See* Fed. R. App. P. 4(a)(4); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982); *see also*, Court's Supplemental Opinion and Order, notes 3-7 and accompanying text, issued concomitantly with this Memorandum Opinion and Order.

First Amendment on its face. The Plaintiffs sued Alabama's Attorney General, in his official capacity, as he is charged with the enforcement of Alabama statutes. The Plaintiffs also sued the State Board of Education and all of its members, including the State Superintendent of Education and the Governor, and the President of the State Board of Education, all in their official capacities. These parties, charged with implementing Alabama's laws regarding education, promulgated an administrative regulation, based on Alabama Code Section 16-1-20.3. The DeKalb County Board of Education carried out the statute and the regulation in the DeKalb County schools, where Michael Chandler works and where Jesse Chandler attends. This court has already addressed the facial statutory claim in its March 12, 1997 Opinion and Order ("March 1997 Opinion and Order"). There, the court found that § 16-1-20.3 violated both the Free Exercise Clause and the Establishment Clause of the First Amendment. The facial claim has been resolved as against these Defendants by the court's March 1997 Opinion and Order.

Based, in part, upon the court's findings in its March 1997 Opinion and Order, the court now finds that Plaintiffs are entitled to judgment as a matter of law on all of their claims discussed below. The court has made extensive factual findings in its Supplemental Opinion and Order issued concomitantly with this order, discussing injunctive relief, and it has delineated there general facts related to injunctive relief as well as summary judgment facts. The court does not recapitulate in toto those factual findings here, but rather, summarizes the facts at summary judgment and focuses on the law, including the burden the DeKalb County Board of Education bears at summary judgment.[2]

SUMMARY JUDGMENT STANDARD

On a motion for summary judgment, the court is to construe the evidence and factual inferences arising therefrom in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Summary judgment can be entered on a claim only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). As the Supreme Court has explained the summary judgment standard:

> [The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's

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[2] While the DeKalb County Board filed affidavits, it did not make reference to them in its brief nor suggest in its brief that there were "genuine issues of material fact" which remain to be resolved. Instead, the DeKalb County Board argued that if the court were to rule on the facial challenge to the statute, most of the issues in this case would be resolved. The Governor, over the Plaintiffs' protests, did oppose the motion for partial summary judgment against DeKalb County, filing a brief which dealt extensively with the filed affidavits.

> case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The trial court's function at this juncture is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted). A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248; *see also Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir. 1989).

The party seeking summary judgment has the initial burden of informing the court of the basis for the motion and of establishing, based on relevant "portions of 'the pleadings, depositions, answers to interrogatories, and admissions in the file, together with affidavits, if any,' "that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. Once this initial demonstration under Rule 56(c) is made, the burden of production, not persuasion, shifts to the nonmoving party. The nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324; *see also* Fed. R. Civ. P. 56(e).

In meeting this burden the nonmoving party "must do more than simply show that there is a metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). That party must demonstrate that there is a "genuine issue for trial." Fed. R. Civ. P. 56(c); *Matsushita,* 475 U.S. at 587. An action is void of a material issue for trial "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita,* 475 U.S. at 587.

In other words, the moving party must show a legal basis for the court to enter judgment, but it does not have to shoulder the burden of production. Once the moving party has made such a showing, it falls to the nonmoving party to produce evidence sufficient to establish the truth of each element on which it will bear the burden of proof at trial.

In *Celotex,* for example, the defendant, relying solely on the plaintiff's discovery responses, moved for summary judgment. Without producing any evidence that tended to negate the plaintiff's claims, the defendant argued that the plaintiff could not prove her claims at trial. In upholding the trial court's grant of judgment in favor of the defendant, the *Celotex* Court held that at summary judgment, the nonmoving party must support his or her claims. The moving party does not have to disprove them. It held that nothing in Rule 56 requires a moving party to support its motion with affidavits or with anything else that would disprove the nonmoving party's (usually the plaintiff's) claims. See *Celotex,* 477 U.S. at 323. The moving party does not even have to prove the nonexistence of a genuine issue of material fact, but rather the nonmoving party must demonstrate that genuine issues for the fact finder do exist. *Id.* at 325, U.S. at 249.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISCUSSION[3]

It is with these principles in mind that the court views the Governor's submission on behalf of DeKalb County and the affidavits filed by DeKalb County itself. Even when taking Defendants' responses into consideration, and under the standards enunciated herein, the court still finds that Plaintiffs are entitled to summary judgment. While the affidavits deny the existence of any "religious" activities, the witnesses simultaneously acknowledge that Bible readings, prayers and "devotionals" have taken place at various DeKalb County school-sponsored settings. Under *Celotex*, this is not a showing sufficient to demonstrate the existence of a genuine issue of fact. Whether a "devotional" took place may be a fact for resolution by the fact finder, but whether an admitted "devotional" given over the intercom during the school day violates the First Amendment is a matter of law for the Court to decide.

The court is mindful that it must draw inferences in favor of the nonmoving party. Nevertheless, when the nonmoving party, here DeKalb, as represented by the Governor, offers testimony in an affidavit that is internally contradictory, the court does not believe that it is under an obligation to ignore facts admitted by the witness (i.e., that Bible readings or prayers occurred) in favor of that witness' characterization of the same event (the Bible readings and devotionals that ended with a prayer were "not religious"). Similarly, the court does not believe that it is under an obligation to assume for purposes of summary judgment that an event did not occur, when, in response to the allegations of the Plaintiff, the Defendants' witness states that he or she does not remember whether the event took place or not. The court does not believe that this is a showing sufficient to "negate [the plaintiff's] claims" and demonstrate the existence of a material issue of fact.

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[3] Because of the factual nature of this inquiry, the court combines its analysis.

I. Plaintiffs' Motion for Partial Summary Judgment

The Plaintiffs moved for summary judgment as to several religious practices ongoing in DeKalb County. Some of these overlap with the issues on which Plaintiffs also sought judgment on the pleadings. The court notes at the outset that stipulations among parties are admissible for Rule 56 purposes and require no extrinsic evidence. *Hadady Corp. v. Dean Witter Reynolds*, 739 F. Supp. 1392, 1395 n. 2 (D. Cal. 1990).[4] The same is true of undisputed documents. See 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure, § 2730.1 & nn. 10-11, at 84-85. The court may also consider affidavits earlier submitted in support of a motion for preliminary injunction. *Clinkscales v. Chevron USA, Inc.*, 831 F.2d 1565 (11th Cir. 1987). Any exhibits in the court file at summary judgment may be admitted, regardless of the reason for their initial submission. *McLaughlin v. Liu*, 849 F.2d 1205, 1206 n. 3 (9th Cir. 1988).

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[4] The Eleventh Circuit has held, in a ruling based on stipulated facts, that if evidence is capable of different reasonable interpretations, findings based on one of these reasonable interpretations are not clearly erroneous. *GLBA v. Pryor*, 110 F.3d 1543, 1546-47 (11th Cir. 1997) (*quoting L & C Marine Transport, Ltd. v. Ward*, 755 F.2d 1457, 1461 (11th Cir. 1985)).

A. Prayer at Football Games

In his affidavit, filed along with the Complaint, Michael Chandler offered testimony regarding prayers at the DeKalb County high school football games in paragraphs 8-16. Therein, he specifically testified that he has personally witnessed such prayers; that he has been offended on his behalf and on behalf of his son Jesse; and that he videotaped some of these prayers, including one at Valley Head High School, where he must attend all home games,[5] that occurred September 1, 1994. His Declaration under Penalty of Perjury of November 10, 1996 similarly contains testimony that students have been leading prayers at high school football games.[6] None of the Defendants has offered testimony that contradicts any of this evidence or that constitutes a genuine question of material fact.[7]

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[5] *See* Amended Answer of DeKalb County Board of Education, ¶ 19. *See also* Plaintiffs' Designation of Exhibits filed November 21, 1996 and Affidavit of Michael Chandler filed February 1, 1996.

[6] Exhibit B to the Plaintiffs' Motion to Enforce Voluntary Cessation Agreement is the videotape which according to the Chandler February 1, 1996 affidavit includes the September 1, 1994 Valley Head prayer. It also includes filmed prayer after this lawsuit was filed at Geraldine High School, but for purposes of summary judgment, the court does not consider the Geralding prayer.

[7] It is not the court's province to judge Mr. Parrish's veracity at this stage. Assuming that he is telling the truth, and

The practices which DeKalb has admitted in its Stipulations, paragraphs 51, 53 and 55, are unconstitutional, regardless of any purported explanation for them. *See Abington Twp. v. Schempp*, 374 U.S. 203, 223-24 (1963); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 830 (1989), *cert. denied*, 490 U.S. 1090 (1989); *Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646 (11th cir. 1984). The court has so found in its March 1997 Opinion and Order.

B. Bible Readings and Devotionals at Assemblies

The DeKalb Defendants have admitted that students gave "words of inspiration" and a teacher sang a religious song at a D.A.R.E. graduation attended by all fifth grade students. (Defendants' Response ¶¶ 28-32).[8] They do not deny, as the Plaintiffs allege in Stipulation number

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that pregame student or clergy-led prayers had ceased during the 1996 school yard, this is not a defense to the Plaintiffs' motion for summary judgment.

If a defendant could assure itself victory in a lawsuit simply by promising to "be good" in the future, the courts would be overrun with parties repenting of their past wrongdoing – temporarily. It is axiomatic that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case. . . . " *United States v. W.T. Grant Co.*, 345 U.S. 628, 632 (1953); *see also United States v. Oregon State Med.Soc'y*, 343 U.S. 326, 333 (1952).

Mr. Parrish does not deny that pre-football game prayers have occurred in the past, but rather he claims that this activity has stopped after the lawsuit was filed. (Parrish Aff., ¶ 6.) Even assuming that this were true, voluntary cessation of allegedly unconstitutional conduct is not a defense.

[8] While the D.A.R.E. program is not compulsory, all fifth graders in DeKalb County participate. See Stipulation 28.

30, that these words included a reading from the Old Testament. (Stipulation 30.) Rather, they "admit that two students volunteered to give words of inspiration at the D.A.R.E. graduation program at Fyffe School on May 18, 1994." (Stipulation 30.) In supplemented discovery apparently served February 4, 1995, the DeKalb Defendants equate "words of inspiration" with a "devotion."[9] In addition, the DeKalb Defendants admit that student-led devotionals have occurred during school-sponsored events and over the public address system. (Defendants' Response ¶¶ 30, 50). Michael Chandler's February 1, 1996 affidavit similarly offers testimony of student-led devotionals. While Donna Taheri testified to her opinion that student devotionals are merely inspirational rather than religious, and to her recollection that "there has never been a religious activity of any description at a D.A.R.E. ceremony," testimony elsewhere in her affidavit indicates that some students at D.A.R.E. graduation ceremonies gave Bible readings.

In response to Plaintiffs' Interrogatory Number 5, "Do the DeKalb defendants contend in this lawsuit that this May 18, 1994 action by these two students was 'non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions?'," the DeKalb defendants responded, "Yes" in addition to equating "words of inspiration" with "devotion[s]." The court finds it reasonable to conclude that mere "words of inspiration" would not require the invocation of the Alabama school-prayer statute and that DeKalb conflated such a category of inspirational words into the category of devotions in hopes of thereby insulating them from scrutiny. The specific invocation of the statute would not be necessary for secular "words of inspiration," and DeKalb has expressly invoked the language of the statute in discovery responses.

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[9] The supplemental discovery, response to interrogatory number 5, is appended as Exhibit C to Plaintiffs' April 1, 1997 Supplement to Motion for Sanctions and Opposition to DeKalb Defendants' Request for Time.

The same is true of conceded devotionals at Plainview School, referenced in Stipulation 50 and similarly answered "Yes" in response to the same contention interrogatory referencing that specific conduct. (In Stipulation 50, the DeKalb Defendants actually term the exercise "devotionals" and then additionally invoke the language of the statute.)

The court finds that a devotional is generally understood to be religious and that the affidavit of Bill Ayers refers to devotionals that took place at Plainview. He also testified to student messages over the intercom during the Gulf War that were of "a devotional character, . . . but not religious," in paragraph 5 of his affidavit, while simultaneously testifying in paragraph 3 that he had no recollection of devotionals being broadcast. He testified that student messages "of a devotional character" contained "no religious references" although "there may have been an occasional brief religious reference or prayer." (Ayers Aff., ¶ 5.) The students giving the messages "did not pray and read the bible" "each" of the "three or four, maybe five times" they led the devotionals, according to Mr. Ayers.

He also testified to a devotional over the public-address system on Veterans Day 1995. DeLayne Etherton testified that this "devotion, meditation, or other inspirational message" ended with a prayer. (Etherton Aff., ¶ 8.) Like Mr. Ayers, DeLayne Etherton cannot recall "if a Bible reading or prayer was given" on other occasions "although there may have been, but not each time."

DeLayne Etherton cannot specifically recall the content of these "so-called 'devotionals' " that were "not necessarily" prayer and Bible reading. DeLayne Etherton does recall, however, that the Veterans Day message ended with a prayer but "was not of a religious nature." (*Compare* Etherton Aff. ¶ 8 *with* ¶ 6.)

At this juncture, *Celotex* comes into play. Testimony about "nonreligious" devotionals that ended with a prayer and that were conducted with the protection of a statute that permits "student-initiated prayer, invocations and benedictions" at school events does not establish a genuine issue of material fact. Similarly, a witness who states that he cannot remember whether or not an event alleged to have happened by the moving party actually took place does not help the nonmoving party to meet its burden. The nonmoving party must come up with evidence that negates the version of events alleged by the moving party – an acknowledgment that the event may have occurred, but the witness cannot remember, falls short.

The court cannot reconcile these observations with the truism that prayer is a quintessentially religious act. The court further notes that, despite protestations that messages were merely inspirational or patriotic from all of DeKalb County's affiants, once again, it answered the Plaintiffs' contention interrogatory referencing student-initiated prayer in the language of the statute, "Yes."

The admissions of paragraphs 30 and 32 of the DeKalb Defendants' response are admissions of constitutional violations. *See Engel,* 370 U.S. at 426; *Schempp,* 374 U.S. at 203. These activities are unconstitutional, even if the religious devotionals were led or given by students. *Schempp,* 374 U.S. at 207, 83 S.Ct. at 1563 (prayer and Bible reading); *Treen,* 653 F.2d at 902 (prayer); *Ingebretsen,* 88 F.3d at 279; *Hall,* 656 F.2d 999 (student-led devotionals); *Meltzer v. Board of Pub. Instr.,* 548 F.2d 559, 573-73 (5th Cir.), *aff'd rehearing en banc,* 577 F.2d 311, 312 (5th Cir. 1978), *cert. denied,* 439 U.S. 1089 (1979) (student-led devotionals); *Herdahl v. Pontotoc County Sch. Dist.,* 887 F. Supp. 902, 908-09 (N.D. Miss. 1995) (student-led devotionals over public-address system are not within the ambit of Equal Access Act, 20 U.S.C. 4071 et seq; Bible readings followed by short prayer speak to a captive audience through state machinery).

None of the affiants aid DeKalb County in establishing a genuine question of material fact as to prayer and devotionals – it is admitted in the affidavits, and in stipulations that predated them – that prayer occurred. The court concludes that there is no de minimis exception for Establishment Clause violations. *Schempp,* 374 U.S. 203, 225 (1963); *Jager,* 862 F.2d at 832 (irrelevant that pregame prayers are brief and football season is short). Nor is the court persuaded that an exception exists for perceived crises and wartime. Indeed, the court would suspect that we might be most vigilant about the Establishment Clause at precisely such times. *See generally Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985).

C. Prayer in Classrooms

It is uncontroverted in the pleadings and in the record that there has been prayer in classrooms, as Plaintiffs allege. The court notes that the DeKalb County Defendants have responded to Plaintiffs' interrogatories regarding faculty solicitation of student volunteers to lead classroom prayer with the response that such activity was undertaken as "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (*See* Plaintiffs' First Discovery Request to DeKalb Defendants; DeKalb Defendants 'Answers to Plaintiffs' First Set of Interrogatories, "Yes").

Further, Michael Chandler testified in his affidavit that Ms. Carroll allowed prayer in her classroom and selected students to lead prayers over the course of several years, including in 1995. Ms. Carroll was one of Jesse Chandler's teachers in both fifth and sixth grades, and her classroom practices regarding prayer and religious activity were substantially similar in the 1993-94 and

1994-1995 school years. Mr. Chandler also testified that in 1995, Ms. Carroll read from her Bible to the class and selected devotionals for students to read.

As noted, the Defendants do not challenge this evidence. Indeed, they offer no testimony from Ms. Carroll. In paragraph 16 of their Amended Answer, the DeKalb County Defendants admit that Ms. Carroll allowed student volunteers to pray in front of the class. In stipulation 46, the DeKalb County Defendants "admit that Ms. Carroll asked for volunteers to lead prayers." Defendants also admit that Ms. Carroll read aloud from the Bible, and "may have selected devotionals for students to read." The Plaintiffs asked the DeKalb Defendants in discovery, "In paragraph 46 of the DeKalb Defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, 'Defendants admit that Ms. Carroll asked for volunteers to lead prayers.' Do the DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions'?" The Defendants responded, "Yes."

The court concludes, as it concluded in its March 1997 Opinion and Order, with reference to the statute, that such practices are unconstitutional regardless of whether the practices are ostensibly "voluntary" or "student- initiated" and regardless of whether prayers are nonsectarian or students may be excused from the classroom.[10] The court finds that such classroom practices need not involve direct coercion in the form of a legal penalty or sanction in order to offend the Establishment Clause.[11] The court further finds that it should be clear that activities such as those admitted by DeKalb County have been squarely governed by Engel and Schempp for some 35 years.

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[10] *Engel v. Vitale*, 370 U.S. 421, 423-24 (1962); *Schempp*, 374 U.S. at 224-25; *Lee*, 505 U.S. at 599; *Ingebretsen v. Jackson Pub. Sch.*

That said, the court further concludes that the teaching of Schempp is also that the Bible may be studied for its literary and historic qualities and that "such study of the Bible, when presented objectively as part of a secular program of education" is constitutional. This is distinct from reading devotionals from the Bible absent academic content.

D. Distribution of Bibles and Religious Literature by Nonstudents

The DeKalb Defendants admit in their responses to stipulations that they permit representatives of Gideons International to distribute New Testaments to public school students in the classroom. (Stipulation ¶ 35.) Gideons representatives have been allowed to enter classrooms and make presentations to the students. (Powell Aff., ¶ 5.) Jesse Chandler was in a classroom where such presentations and distributions took place and felt compelled to accept a Bible. (Chandler Aff., ¶ 21.) The court

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Dist., 88 F.3d 274, 279 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 388 (1996); *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1479-80 (3d Cir. 1996); *Herdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902, 908 (N.D. Miss. 1995); *Gearon v. Loudoun County Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993).

[11] *Lee*, 505 U.S. at 592-95.

does not seek to resolve any factual issue as to the content of any presentation the Gideons might make, because it is not material in view of the fact that the Gideons are impermissibly in the classroom during instructional time.

Courts have uniformly held that school officials are prohibited from permitting outside groups and individuals to distribute Bibles and other religious literature to students on public school property. See *Berger v. Rensselaer Central Schl. Corp.*, 982 F.2d 1160 (7th Cir. 1993), *cert. denied*, 113 S. Ct. 2344 (1993); *Gregoire v. Centennial Schl. Dist.*, 907 F.2d 1366 (3d Cir. 1990); *Lubbock C.L.U. v. Lubbock Indep. Schl. Dist.*, 669 F.2d 1038, 1040, n. 38 (5th Cir. 1982).[12] The reason for this proscription is that students are a captive audience in such situations and face school and peer pressure to accept the Bibles. In addition, such Bible distributions interfere with the rights of parents to raise their children according to family religious traditions. *See Schempp*, 374 U.S. at 226.

Bible distribution creates the impression of school endorsement of the religious activity and, as at least one court has noted, facilitates the accomplishment of the religious mission of groups such as the Gideons. *See Berger*, 982 F.2d at 1171. Such distribution here expressly occurred with the permission of school officials, such as Mr. Ashley and Ms. Powell at Fyffe. Superintendent Parrish testified that there is no formal written policy governing distributions of materials. (Parrish Aff., ¶ 8.) Policy is established by the individual school principals, and varies widely. (See Parrish Aff., ¶ 8; Ashley Aff., ¶ 8.)

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[12] Public school classrooms and buildings are not public for such that outside groups have any cognizable free-speech interest in distributions. *Berger*, 982 F.2d at 1166. Here, of course, the issue is distribution inside public-school classrooms during instructional time.

Ms. Powell and Mr. Ashley testified that a distribution that occurred after homeroom was aberrational. (Ashley Aff., ¶ 6; Powell Aff., ¶ 5.) This testimony is not material because it does not affect the legal question concerning whether homeroom time is instructional time for establishment clause purposes.[13] Thus, any attempt to explain away the unconstitutional activity as an aberration or exception is unavailing. (*See, e.g.*, Ashley Aff., ¶ 6.) Defendants admit that they allowed Bible distribution to occur in a classroom setting, with participation of school officials; an atmosphere rife with potential for both proscribed endorsement of religion and peer pressure. A practice of in-school distribution immediately before the first class period is still constitutionally infirm. (*See* Powell Aff., ¶ 5.) The court is not persuaded by the "homeroom period is noninstructional time" argument made by all the Defendants' affiants on the subject.

Michael Chandler testified that all students are required to attend homeroom periods and that DeKalb County schools are closed campuses and that students are not free to leave. (Chandler Dec. of November 10,

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[13] The court notes that the Equal Access Act applies only to secondary, not primary schools. It is not implicated as regards the Gideon distributions at issue here.

1996.) Nowhere in the record is this testimony controverted. Moreover, the court finds that the question of what is "instructional time" for purposes of the Establishment Clause in such situations is resolved by *Schempp*. *Schempp* explicitly involved Bible readings which opened the school day. They were not given during time otherwise reserved for academic instruction, but rather, during homeroom, and were struck as unconstitutional. The classroom is not traditionally a public forum. *See, e.g., Lamb's Chapel v. Center Moriches Union Sch. Dist.*, 508 U.S. at 392; *see also Berger*, 982 F.2d at 1167.

The distribution of Bibles or other religious material by nonschool persons during the school day, regardless of the exact location where that distribution took place (even outside the actual classroom), and purportedly involving only "willing" students, has been almost uniformly held unconstitutional. The critical factors for the courts are that students will feel compelled through peer pressure to accept the Bibles and will sense state endorsement. *Berger*, 982 F.2d at 1166-1167 & n. 7 (Gideon distribution at school "gives the Bible distribution an official quality."). The court finds that Defendants' practice of allowing Gideons and other outside groups to distribute Bibles and/or other religious materials to students during the homeroom period violates the Establishment Clause.

E. Miscellaneous Matters

The court notes that initially, the DeKalb Defendants did not file a response to the Plaintiffs' motion. However, the Governor responded to the motion filed against the

DeKalb Defendants and concerning only events which took place in DeKalb County schools. The DeKalb Defendants then filed a separate opposition to the Plaintiffs' Motion for Partial Summary Judgment, which ignored the affidavits purportedly offered on their behalf, made no reference to evidence, and relied on section 16-1-20.3 as DeKalb's sole justification for its actions. DeKalb County urged the court to rule on the facial validity of the statute before any other matters, representing that this would moot these remaining matters.

Plaintiffs moved to strike DeKalb affidavits on a number of grounds that were briefed extensively. The court finds that it need not do so, however, because it finds that DeKalb County has failed to meet its burden of adducing any evidence suggesting that a genuine question of material fact exists. Further, the matters raised in the affidavits purport to insinuate defenses to the Plaintiffs' claims. Legal conclusions about homeroom time, speculations about a witness' thoughts and motives, contradictions of earlier materials in the record while still offering admissions, and espousals of the theory that patriotism or national crisis justifies violation of the Establishment Clause do not meet the burden of resisting summary judgment here. Asking the court to decide the facial issue first is not evidence. Likewise, the court has already rejected the Governor's theory that the Free Exercise Clause negates the Establishment Clause:

> Although the Establishment Clause works with the Free Exercise Clause to fully safeguard our religious freedom, there is an inherent tension between the two clauses. If the Free Exercise

> Clause were an absolute mandate, it would subsume the Establishment Clause. Paradoxically, making "Free Exercise" an absolute mandate would . . . effectively destroy "freedom of religion" as we know it.
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> . . . .
>
> Although the Free Exercise Clause guarantees complete freedom of belief, the guarantee does not extend to protect all religious activity. . . . If the Free Exercise Clause protected all religious activity, it would not be possible to maintain a civil, pluralistic society. . . . Similarly it is easy to see how the absolute protection of religious activity would quickly lead to an establishment of religion.

March 1997 Opinion and Order at 6-7 (internal citations omitted). In response to the argument that the statute, by allowing "nonproselytizing, nonsectarian student initiated prayers at compulsory and noncompulsory school-related events," did no more that set forth the students' Free Exercise rights, the court has noted:

> Under the dictates of the Establishment Clause and Supreme Court decisions, students do not have an absolute right to engage in such prayer. While the defendant argues that the statute does no more than recognize students' free exercise and free speech rights, the Court will not ignore the plain meaning of the statute. . . . section 16-1-20.3 . . . authorizes religious activity in our public schools which is plainly unconstitutional.

March 1997 Opinion and Order at 36 n. 31.

The court likewise finds no merit in the argument that state action is lacking. This argument, too, has been rejected by the court in its March 1997 Opinion and

Order. In discussing the constitutionality of "voluntary" or "student-initiated" prayer, the Court discussed the relationship between student choice and state action:

> Moreover, in the public school setting, federal courts have repeatedly struck down legislation and practices permitting prayer, even when the prayer at issue was ostensibly "voluntary" or "student-initiated." For example, in *Engel v. Vitale,* the Supreme Court declared unconstitutional a school district's practice of having students recite aloud a non-denominational prayer even though students were free to elect not to participate.
>
> . . . .
>
> Similarly, because the resources and facilities of the state are utilized when a "student-initiated" prayer is given in public schools, those hearing the prayer may be led to believe the state is associated with or endorses either the speaker's religion, or religion over non-religion.

March 1997 Opinion and Order at 10-11.

As to all of Plaintiffs' claims, the court rejects the apparent de minimis argument. The Governor argues that nonpervasive First Amendment violations are unworthy of the court's notice. (*See* Gov. Br. at 17 (prayer before a football game is "a minute part of the program"); Gov. Br. at 14 ("any incidental religious comment does not work an establishment of religion"); Gov. Br. at 12 (no constitutional violation occurs where religious activities are not "pervasive"); *see also* Powell Aff., ¶ 5 (Gideon presentation was "short").) The argument is, as already noted, unavailing. *See Engel,* 370 U.S. at 436; *Schempp,* 374 U.S. at 224-25.

Most recently, in *Lee v. Weisman*, the Supreme Court was again confronted with the claim that a brief "nonsectarian" prayer occurring once in a lifetime was a de minimis act. The Court again rejected the de minimis argument:

> It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a de minimis character. To do so would be an affront to the Rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority . . . [T]he intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights.

Lee, 505 U.S. at 594.

In *Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989), Judge Johnson rebuffed the school district's contention that a prayer of 60 to 90 seconds is a "de minimis violation." *Id.* at 832. Judge Johnson wrote:

> This approach is flawed. It is 'no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment'. . . . The Establishment Clause does not focus on the amount of time an activity takes, but rather examines the religious character of the activity. As the Fourth Circuit recognized . . . '[a] prayer, because it is religious does advance religion and the limited nature of the

> encroachment does not free the state from the limitations of the Establishment Clause.'

Id. (internal citations omitted).

Nothing in the evidence rescues the Defendants from the mandates of *Celotex*. Nothing in the evidence suggests either a valid defense or a genuine question of material fact. The Defendants' affidavits do not do so. Accordingly, the court finds that summary judgment is due to be granted.

ORDER

Based on the foregoing, it is hereby CONSIDERED and ORDERED that:

(1) That portion of the court's October 31, 1997 Order denying as moot Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment be and the same is hereby VACATED. All other aspects of the court's October 31, 1997 Order shall remain in full force and effect.

(2) Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment be and the same is hereby GRANTED.

(3) The court's Supplemental Opinion and Order, issued concomitantly, on this date, with this Memorandum Opinion and Order shall be and the same is hereby INCORPORATED BY REFERENCE into this Supplemental Opinion and Order.[14]

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[14] See the court's Supplemental Opinion and Order, also issued on this date, at footnote 53 and accompanying text.

DONE this the 12th day of November, 1997.

/s/ Ira DeMent
UNITED STATES
DISTRICT JUDGE

Michael CHANDLER, et al., Plaintiffs,
v.
Forrest H. "Fob" JAMES Jr., et al., Defendants.

Civil Action No. 96-D-169-N.
United States District Court,
M.D. Alabama,
Northern Division.

March 12, 1997.

MEMORANDUM OPINION AND ORDER

DE MENT, Judge.

In 1977, the Alabama legislature passed the first in a series of "school prayer" statutes. This first statute, which provided for a moment of silence at the beginning of the school day, see Ala.Code § 16-1-20 (1995), was supplemented in 1981 by a statute which specifically provided that the moment of silence "shall be observed for meditation or voluntary prayer." Ala.Code § 16-1-20.1 (1995). Then, in 1982, a third school prayer statute was passed which "recogniz[ed] that the Lord God is one" and permitted public school teachers to lead willing students in a specified prayer. Ala.Code § 16-1-20.2 (1995). Both the 1981 and 1982 statutes were struck down because they violated the Establishment Clause of the First Amendment to the United States Constitution. *See Jaffree v. Wallace,* 705 F.2d 1526, 1535-36 (11th Cir. 1983), *aff'd,* 472 U.S. 38 (1985) (section 16-1-20.1); *Jaffree v. Wallace,* 705 F.2d 1526, 1535-36 (11th Cir. 1983), *aff'd,* 466 U.S. 924 (1984) (section 16-1-20.2).

In 1993 the Alabama Legislature enacted a fourth statute. The operative portion of § 16-1-20.3 reads:

> (b) On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.

Ala.Code § 16-1-20.3(b) (1995). In 1996, the plaintiffs filed this suit asserting, among other things, that § 16-1-20.3 is facially unconstitutional. Thus, the Court must decide whether this latest school prayer statute has been cured of the infirmities that rendered its predecessors unconstitutional.

To begin, the Court will review the landscape of Establishment Clause jurisprudence as it relates to public schools in order to provide a context for the Court's discussion of the statute at issue. Religion has been, and continues to be, an important part of many Americans' public and private lives. *See School Dist. of Abington Township, Pennsylvania v. Schempp,* 374 U.S. 203, 212-13 (1963); *Engel v. Vitale,* 370 U.S. 421, 433-35 (1962); *Zorach v. Clauson,* 343 U.S. 306, 313 (1952). The pervasiveness of religion in this country is apparent from its frequent manifestation in public life – from prayers marking the opening of Congress and many state legislatures, *see Marsh v. Chambers,* 463 U.S. 783 (1983), to the affirmation found on our legal currency, to the oaths of office taken by many of our publicly elected officials. *See Schempp,* 374 U.S. at 213 (noting various examples of religious affirmations in public life); *see also* E. Gregory Wallace, *When*

Government Speaks Religiously, 21 Fla. St. L.Rev. 1183, 1183-1185 (1994) (same).

It was devout religious conviction which led many colonists to leave England and settle in America. Unwilling to suffer the state-sponsored Church of England, many settlers came to this country in search of the right to freely exercise their religious beliefs – to be free from state-established religion. *See Engel,* 370 U.S. at 434, 82 S.Ct. at 1269. Eventually, these rights were memorialized in the First Amendment to the Constitution: "Congress shall make no law respecting an establishment of religion," (the Establishment Clause) "or prohibiting the free exercise thereof" (the Free Exercise Clause). U.S. Const. amend. I.[1]

The right to be free from state-established religion lies at the heart of the concept of "freedom of religion." *See Lee v. Weisman,* 505 U.S. 577, 591 (1992) ("the Framers deemed religious establishment antithetical to the freedom of all"). It has been said that nothing short of a "wall of separation between church and state" can adequately safeguard our religious freedom. *See Everson v. Board of*

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[1] The Court is keenly aware that the First Amendment directs that "Congress shall make no law . . . " U.S. Const. amend. I (emphasis added). However, the Supreme Court has held that the guarantees of the First Amendment, through the Fourteenth Amendment, are equally applicable as against the states. *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).

Educ. of Ewing, 330 U.S. 1, 16-18 (1947). While this wall may be more metaphor than mortar, *see Lemon v. Kurtzman,* 403 U.S. 602, 614 (1971) ("far from being a 'wall,' [the Establishment Clause] is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship"), the concept continues to be a useful one as the separation of church and state is fundamental to the preservation of our pluralistic society.

The framers codified at least two purposes when they enacted the Establishment Clause. "Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *See Engel,* 370 U.S. at 431. Although frequently touted as a telic tool used by religious dissenters, the Establishment Clause is properly seen as an essential safeguard for the sanctity of religious belief. James Madison acknowledged this when he stated, " '[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.' " *Lee v. Weisman,* 505 U.S. 577, 590 (1992) (quoting James Madison's *Memorial and Remonstrance Against Religious Assessments* (1785), in 8 *Papers of James Madison,* 301 (W. Rachal et al. eds. 1973)). While government support of religion may, for the benefitted believer, have an initial appeal, this support ultimately leads to governmental influence and a concomitant erosion of religious tenets. For this reason, "[i]t is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government." *Schempp,* 374 U.S. at 259 (Brennan J. concurring).

Second, by enacting the Establishment Clause, the framers sought to prevent the political persecution of those people of a minority faith. *See Engel,* 370 U.S. at 431. Religious faith can be a powerfully divisive force. *See Sch. Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 382 (1985) ("[J]ust as religion has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance."). While our political system is founded on majoritarian principles, freedom of religious belief was deemed too important to be subject to the whim of the majority. *See Schempp,* 374 U.S. at 226 (a majority cannot "use the machinery of the state to practice its [religious] beliefs"); *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."). The Establishment Clause prevents one's religious beliefs from being made relevant to one's standing in the political community. *See Lynch v. Donnelly,* 465 U.S. 668, 688 (1984) (O'Connor, J. concurring).

The Establishment Clause works together with the Free Exercise Clause to protect our religious freedom. As discussed above, the Establishment Clause prevents the majority from legislating preferential treatment for those of a particular religious faith. In turn, the Free Exercise clause insures that government will not unduly burden the practice of any religious faith. *See e.g Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993); *Braunfeld v. Brown,* 366 U.S. 599 (1961) ("If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid."). Together, "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the state." *Lee,* 505 U.S. at 589.

Although the Establishment Clause works with the Free Exercise Clause to fully safeguard our religious freedom, there is an inherent tension between the two clauses. *See Walz v. Tax Comm'n,* 397 U.S. 664, 668-69 (1970). If the Free Exercise Clause were interpreted as an absolute mandate, it would subsume the Establishment Clause. *Id.* Paradoxically, making "Free Exercise" an absolute mandate would, for all the reasons discussed above, effectively destroy "freedom of religion" as we know it.

The Free Exercise Clause does, however, contain an absolute component: freedom of belief. *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940). The government can never take action which has the effect of proscribing or prescribing a belief. Thus, in *West Virginia State Board of*

Education v. Barnette, 319 U.S. 624, the Supreme Court declared unconstitutional a resolution which required students to salute and "pledge allegiance" to the flag of the United States or face expulsion and other punitive measures.[2] The Court stated, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

Although the Free Exercise Clause guarantees complete freedom of belief, the guarantee does not extend to protect all religious activity. *Cantwell,* 310 U.S. at 303-04 ("[T]he [First] Amendment embraces two concepts, – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."). If the Free Exercise Clause protected all religious activity, it would not be possible to maintain a civil, pluralistic society. To take an obvious example, consider a religion which required adherents to make human sacrifices; while the Free Exercise Clause protects the right to ascribe to such a faith, it would not protect believers who acted in accordance with such tenets. *See Employment Div. Dept. of Human Resources v. Smith,* 494 U.S. 872, 882-90

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[2] The Court's decision in *Barnette* did not rest solely on the appellant's assertion of Free Exercise rights, but turned on principles guiding the First Amendment as a whole.

(1990). Similarly, it is easy to see how the absolute protection of religious activity would quickly lead to an establishment of religion. If a school principal's religious beliefs commanded him or her to "save" others and taught him or her that other religions were false, he or she might consider it his or her religious duty to "establish" his or her religion in that particular school.[3] And, if the Free Exercise Clause were an absolute, the principal would have a constitutional right to press his or her religious views on students through official school channels. Clearly, the Free Exercise Clause cannot be interpreted as an absolute mandate.

What then do these complementary, yet competing, clauses (Establishment and Free Exercise) require? They require government to remain strictly neutral both among religions and between religion and non-religion. *County of Allegheny,* 492 U.S. at 590-91; *Ball,* 473 U.S. at 381-82; *Jaffree,* 472 U.S. at 60; *Epperson v. Arkansas,* 393 U.S. 97, 103-04 (1968); *Jager v. Douglas County Sch. Dist.,* 862 F.2d 824, 828 (11th Cir. 1989), *cert. denied,* 490 U.S. 1090 (1989). It is the job of the judiciary to insure that governments do not run afoul of this command of neutrality – to insure that government takes no action which favors or disfavors religion or religious belief. *See County of Allegheny,* 492 U.S. at 592-93; *Barnette,* 319 U.S. at 638.

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[3] While the Court uses this example merely to illustrate its point, this hypothetical principle could very well exist in reality. In the words of the late Mr. Justice Jackson, "in our country are evangelists and zealots of many different political, economic and religious persuasions whose fanatical conviction is that all thought is divinely classified into two kinds – that which is their own and that which is false and dangerous." *American Communications Assn. v. Douds,* 339 U.S. 382, 438 (1950) (Jackson, J. concurring in part and dissenting in part).

Courts must perform this task with added vigilance when governments take action affecting our public schools. "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Edwards v. Aguillard,* 482 U.S. 578, 584 (1987). School children are particularly susceptible to peer pressure and other forms of direct or indirect coercion. *See Ball,* 473 U.S. at 383 ("the government's activities in [public schools] can have a magnified impact on impressionable young minds"). Furthermore, school attendance is mandatory, and while in school, students' expressive behavior is strictly regulated. When prayer is introduced into a public school curriculum, students who find the particular prayer, or prayer in general, offensive cannot express their dissent by "walking away" or verbally objecting. *See Lee,* 505 U.S. at 592-94; *Edwards,* 482 U.S. at 584; *c.f. Marsh,* 463 U.S. at 792 (allowing prayer to open session of state legislature in part because those in attendance are free to enter and leave). In the sensitive setting of our public schools, "[w]hat to most believers may seem like nothing more than a reasonable request that the nonbeliever respect their religious practices [ ] may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee,* 505 U.S. at 592. Thus, what is permissible religious expression or activity in some settings, is regularly held to violate the mandate of neutrality towards religion in our public schools. *See, e. g., Doe v. Duncanville Ind. Sch. Dist.,* 70 F.3d 402, 406-07 (5th Cir. 1995) (prayer at high school basketball game unconstitutional); *Berger v. Rensselaer Central Sch. Corp.,* 982 F.2d 1160, 1170-71 (7th Cir. 1993) (distribution of Gideon's Bibles in public school unconstitutional), *cert. denied,* 508 U.S. 911 (1993); *Jager,* 862 F.2d at 830-32 (prayer at high school football games unconstitutional); *see also* Jonathon C. Drimmer, *Hear No Evil, Speak No Evil: The Duty of Public Schools to Limit Student-Proposed Graduation Prayers,* 74 Neb. L.Rev. 411, 419-20 (1995) (interpreting the principle of "neutrality" in the public school setting to "require[ ] an active participation by the schools to guarantee that religion remain absent from school-sponsored events").

Moreover, in the public school setting, federal courts have repeatedly struck down legislation and practices permitting prayer even when the prayer at issue was ostensibly "voluntary" or "student-initiated." For example, in *Engel v. Vitale,* the Supreme Court declared unconstitutional a school district's practice of having students recite aloud a non-denominational prayer even though students were free to elect not to participate. 370 U.S. at 423-24. The Court stated:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing

> of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. . . . When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

Id. at 430-31; *see also Lee,* 505 U.S. at 599; *Schempp,* 374 U.S. at 224-25; *Jager,* 862 F.2d at 832. Similarly, because the resources and facilities of the state are utilized when a "student-initiated" prayer is given in public schools, those hearing the prayer may be led to believe the state is associated with or endorses either the speaker's religion, or religion over non-religion. *Ingebretsen v. Jackson Pub. Sch. Dist.,* 88 F.3d 274, 279 (5th Cir. 1996), *cert. denied,* 117 S. Ct. 388 (1996); *American Civil Liberties Union v. Black Horse Pike Regional Bd. of Educ.,* 84 F.3d 1471, 1479-80 (3d Cir. 1996); *Herdahl v. Pontotoc County Sch. Dist.,* 887 F. Supp. 902, 908 (N.D. Miss. 1995); *Gearon v. Loudoun County Sch. Bd.,* 844 F. Supp. 1097, 1099 (E.D. Vir. 1993); *but see Jones v. Clear Creek Ind. Sch. Dist.,* 977 F.2d 963 (5th Cir. 1992), *cert. denied,* 508 U.S. 967 (1993).[4]

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[4] The defendants assert that *Jones* is the "first and leading case on this type of issue." Gov.'s and Atty. General's Resp. Br. on Constitutionality of § 16-1-20.3. *Jones,* however, is not controlling precedent in this circuit, is of limited relevance to the instant case, and rests on questionable legal conclusions.

In *Jones v. Clear Creek Independent School Dist.,* the Fifth Circuit held that a resolution permitting high school seniors to

Over the years, the Supreme Court has developed a number of principles designed to aid the courts in their

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choose student volunteers to deliver nonsectarian, nonproselytizing prayers at graduation ceremonies, was constitutional. 930 F.2d 416 (5th Cir.1991). The Supreme Court vacated that decision in light of its decision in *Lee v. Weisman*, 505 U.S. 577 (1992). On remand, the Fifth Circuit again held the resolution was constitutional. 977 F.2d 963 (5th Cir. 1992) *(Jones II)*. Thereafter, the Supreme Court denied certiorari. 508 U.S. 967 (1993).

The statute at issue in the instant case is far broader than a resolution permitting voluntary prayer at a high school graduation. First, § 16-1-20.3 is not limited to high schools, it appears to apply equally to all public schools from kindergarten through twelfth grade. The court in *Jones II* based its decision in part on the contention that, "graduating high school seniors would be less easily influenced by prayer than would their junior schoolmates." 977 F.2d at 967. The court went on to state that it considers "the age of the graduating seniors relevant to the determination of whether prayers under the Resolution can coerce these young people into participating in a religious exercise." *Id.* at 971. The statute at issue here applies to those "junior schoolmates," and thus, the potential coercive effect is much greater than that of the resolution at issue in *Jones II*.

Second, § 16-1-20.3 is not limited to high school graduations as was the resolution in *Jones II*. Under the terms of the statute here, students would be permitted to engage in the type of activity approved of in *Jones II* at all "compulsory or non-compulsory.. school-related student events." § 16-1-20.3(b). It is clear that the court's reasoning in *Jones II* was limited to the high school graduation context. *Id.* at 966 (holding resolution serves a secular purpose because "meaningful graduation can provide task of insuring government neutrality towards and among religions. In *Lemon v. Kurtzman,* 403 U.S. 602 (1971), the Court identified "the three main evils against which the Establishment Clause was intended to afford

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encouragement to finish school and the inspiration and self-assurance necessary to achieve after graduation"). Indeed, subsequent decisions from the Fifth Circuit make it clear that the holding in *Jones II* is limited to the context of a high school graduation. *See Doe v. Duncanville Ind. Sch. Dist.,* 70 F.3d 402, 406 (5th Cir. 1995) (holding unconstitutional practice which permitted basketball coach to supervise and participate in team prayers held at games and practices); *Ingebretsen v. Jackson Public Sch. Dist.,* 88 F.3d 274, 279-80 (5th Cir. 1996) (holding unconstitutional a state statute which permitted student-initiated nonsectarian, nonproselytizing prayer at school-related events, but noting that statute could stand in context of high school graduation).

Finally, despite the defendants' contention, the Court notes that *Jones II* appears to be an aberrational case rather than the "leading case on this type of issue." *See* Alexander Tanford, *The Death of Graduation Prayer: The Parrot Sketch Redux,* 24 J.L. & Educ. 423, 426-33 (1995). With all due respect, the Court believes that the decision in *Jones II* is a departure from established Supreme Court precedent. *See Harris v. Joint Sch. Dist. No. 241,* 41 F.3d 447, 454-57 (9th Cir. 1994), *vacated as moot,* 115 S. Ct. 2604 (1995); Tanford, *supra* at 447-54. Furthermore, the decision in *Jones II* is inconsistent with controlling Eleventh Circuit precedent. *See e.g. Jager,* 862 F.2d at 824. The Court is bound by Eleventh Circuit precedent, and therefore, the Court cannot follow the reasoning set forth in the *Jones II* decision.

protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' " *Id.* at 612 (quoting *Walz v. Tax Commission,* 397 U.S. 664, 668 (1970)). To determine whether a practice or legislation implicates any of these evils, the *Lemon* court summarized the Court's Establishment Clause jurisprudence into three tests: (1) does the statute have a secular purpose[5]; (2) is the principal or primary effect of the statute to advance or inhibit religion; and (3) does the statute foster excessive entanglement with religion. *Id.* at 612-13.[6] If the answer to any of these questions is "yes," then the legislation in question has violated the principle of government neutrality towards and among religions, and is unconstitutional. *Id.* at 613-14; *Jager,* 862 F.2d at 828.

The Supreme Court has since decided a number of cases wherein they have supplemented the tripartite *Lemon* test. In her concurrence in *Lynch v. Donnelly,* 465 U.S. 668 (1984), Justice O'Connor attempted to refine the

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[5] A "secular" purpose is one which "relat[es] to the worldly or temporal as distinguished from the spiritual or eternal." *Webster's Third New International Dictionary,* 2053 (1961).

[6] Although *Lemon* has been the subject of considerable criticism, *see, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 113 S.Ct. 2141, 2149-50 (1993) (Scalia, J., concurring in judgment), it has not been overruled and is unquestionably the law in this circuit. *See, e.g., Chabad-Lubavitch of Georgia v. Miller,* 5 F.3d 1383, 1388 (11th Cir. 1993); *Jager,* 862 F.2d at 828.

"purpose" and "effect" prongs of the *Lemon* test. According to Justice O'Connor, the relevant inquiry is whether the challenged government activity has either the purpose or effect of endorsing or disapproving religion. *Id.* at 688 (O'Connor, J., concurring). To make this inquiry, courts must "examin[e] . . . both the subjective and objective components of the message communicated by a government action." *Id.* at 690 (O'Connor, J., concurring). Such an inquiry helps identify those governmental activities which "intentionally or unintentionally [ ] make religion relevant, in reality or public perception, to status in the political community." *Id.* at 692 (O'Connor, J., concurring). It is these governmental activities that the Establishment Clause intended to strictly prohibit. *Id.* at 687-88 (O'Connor, J., concurring); *see generally* Joel S. Jacobs, *Endorsement as "Adoptive Action:" A Suggested Definition of, and an Argument for, Justice O'Connor's Establishment Clause Test,* 22 Hastings Const. L.Q. 29 (1994). While Justice O'Connor's revision of the *Lemon* test was not adopted by the entire Court, it has frequently proven useful in the Court's analysis of religion cases. *See, e.g., County of Allegheny,* 492 U.S. at 592-93 (Justice O'Connor's analysis "provides a sound analytical framework for evaluating religious symbols."); *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 17 (1989); *Ball,* 473 U.S. at 389; *Jaffree,* 472 U.S. at 60.

After *Lynch,* the Court decided *Lee v. Weisman,* 505 U.S. 577 (1992). In *Lee,* the Court observed, "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'established a state religion or religious faith, or tends to do so.' " *Id.* at 587 (quoting *Lynch,* 465 U.S. at 678). For a practice to have a coercive effect, and thus be unconstitutional, it need not involve direct coercion in the form of a threatened penalty or legal sanction. *See id.* at 592-95. Rather, indirect coercion such as peer pressure will suffice. *Id.* at 592-93. Consequently, in *Lee,* the Court struck down a school's practice of providing a clergyman to deliver a non-sectarian benediction at a high school graduation because students could be pressured by their peers to actually or symbolically participate in the prayer against their wishes. *Id.* at 593.

While the principles discussed in the foregoing cases, *Lemon, Lynch* and *Lee,* help guide the Court's analysis, there remains an abstract quality about these principles such that prohibited and acceptable religious activity in public schools is not always readily discernible. There are however, a number of activities which clearly fall on one side of the line or the other. It will be helpful to review these activities before the Court turns to the constitutionality of the statute at issue.

Acknowledging the significant and pervasive role of religion throughout our history, the Supreme Court has repeatedly stated that religion can and should play a role in our public schools' curriculum. Over the centuries, religion has been the dominant developmental force in the humanities – art, music, literature and the other humanities. The Establishment Clause does not prevent children who attend public schools from learning about these subjects nor from learning about the influence of religion on these subjects. *See Edwards v. Aguillard,* 482 U.S. at 607-08 (Powell, J., concurring). Moreover, "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Stone v. Graham,* 449 U.S. 39, 42 (1980). "The Establishment Clause is properly understood to prohibit the use of the Bible and other religious documents in public school education only when the purpose of the use is to advance a particular religious belief." *Aguillard,* 482 U.S. at 608 (Powell, J., concurring).

As noted earlier, the Free Exercise Clause protects absolutely the right to believe whatever we choose. This right, coupled with our right to freedom of speech found in the First Amendment[7], allows people to espouse their beliefs, including their religious beliefs, in any "public forum"[8] limited only by reasonable time, place and manner restrictions. *See United States Postal Serv. v. Council of Greenburgh Civic Assns.,* 453 U.S. 114, 132 (1981). Children attending public school are "Constitutional people," possessed of Constitutional rights and entitled to Constitutional protections. *See In re Gault,* 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the bill of Rights is for adults alone."); *Tinker v. Des Moines Indep. Sch. Dist.,* 393 U.S. 503, 511 (1969) ("Students in school as well as out of school are 'persons' under our Constitution."). Therefore, subject to the limitations discussed below, children attending public school have the right to espouse their religious beliefs.

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[7] "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

[8] "Public forum" analysis involves determining whether a location, by tradition or government fiat, is dedicated to assembly, debate or expressive activity. *See Perry Educ. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 45-46 (1983). If so, "the rights of the State to limit expressive activity are sharply circumscribed." *Id.* at 45.

The Court's acknowledgment of this right, while intended to be informative, is also dispositive of the issue at hand, the constitutionality of Ala.Code § 16-1-20.3. Section 16-1-20.3(b) provides that public school students may engage in student-initiated, non-sectarian[9], non-proselytizing[10] prayer during compulsory and non-compulsory school-related events. According to the statement of purpose found in subsection (a), the statute is intended "to provide guidance to public school officials on the rights and requirements of the law." Ala.Code § 16-1-20.3(a). In an effort to assure the public and the courts that the statute does not diminish generally the constitutional rights of public school students, and thus

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[9] "Sectarian" religious speech is that which is "confined to the limits of one religious group, one school, or one party." *Webster's Third New International Dictionary,* 2052 (1961).

[10] "Proselytizing" religious speech is that which is intended to "convert [another] from one religion, belief, opinion, or party to another." *Webster's Third New International Dictionary,* 1821 (1961).

"save" the statute, the Alabama legislature added subsection (c) which states that the statute "shall not diminish the right of any student or person to exercise his or her rights of free speech and religion . . . at times or events other than those stated in subsection (b)." Ala.Code § 16-1-20.3(c) (emphasis added).[11] The "times and events" referred to in subsection (c) are "compulsory or noncompulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events." Ala.Code § 16-1-20.3(b). That is, subsection (c) assures the public that the statute has no effect on the constitutional rights of public school students, including the rights of free speech and prayer, except during the times and events enumerated in subsection (b). Regrettably, instead of "saving" the statute, subsection (c) highlights the impermissible effect of the statute – the statute diminishes public school students' free speech and prayer rights during the times and events listed in subsection (b).

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[11] In whole, subsection (b) provides:

> On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or noncompulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.

Ala.Code § 16-1-20.3(b) (1995).

In whole, subsection (c) provides:

> Nothing in this section shall otherwise diminish the right of any student or person to exercise his or her rights of free speech and religion, including prayer, as permitted by the United States Constitution and the Alabama Constitution on public school or other public property, or other property, at times or events other than those stated in subsection (b).

Ala.Code § 16-1-20.3(c) (1995).

The Alabama legislature has defined its public school students' free speech and prayer rights too narrowly. To the extent that students' free speech rights attach, they are free to engage in sectarian, proselytizing religious speech. The legislature's effort to limit the application of the statute's constrictive definition of public school students' free speech and prayer rights to "school-related student events" fails to affect the Court's analysis. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker,* 393 U.S. at 506. Accordingly, the Court finds that § 16-1-20.3 is unconstitutional because it infringes public school students' free speech and prayer rights.[12]

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[12] The state of Alabama may have been justified by limiting its public school students' free speech and religion rights, *see Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 682 (1986) (holding students in school have limited free speech rights); *New Jersey v. T.L.O.,* 469 U.S. 325, 337-41 (1985) (holding students in school have limited rights under the Fourth Amendment), but the state has failed to present any reason for this limitation on its public school students' rights. Nevertheless, the Court does not rest its finding that § 16-1-20.3 is unconstitutional on this basis alone. As will be demonstrated in the discussion below, the statute is unconstitutional for a number of reasons.

The Establishment Clause does not forbid private sectarian,[13] proselytizing speech. In fact, the Establishment Clause has no bearing at all on private speech. The Establishment Clause operates only on government or state-sponsored speech, and then, prohibits all religious speech, not only sectarian, proselytizing religious speech. *See, e.g., Lee,* 505 U.S. at 588-89 (forbidding state-sponsored non-sectarian prayer); *Engel,* 370 U.S. at 430 (same); *Ingebretsen,* 88 F.3d at 279-80 (holding unconstitutional statute which permits student-initiated, non-sectarian, non-proselytizing prayer in public school). This is so because, in addition to forbidding the government from favoring one religion over another, the Establishment Clause forbids the government from favoring religion over non-religion. *E.g. Jaffree,* 472 U.S. at 53 ("the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"); *Karen B. v. Treen,* 653 F.2d 897, 901 (5th Cir. Unit A 1981), *aff'd,* 455 U.S. 913 (1982).[14]

Thus, § 16-1-20.3 is fatally flawed in that it defines students' free speech and religion rights too narrowly.

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[13] The Court doubts whether religious speech can truly be "non-sectarian;" while some prayers are undoubtedly general in nature, all would seem to be imbued with some elements of the speaker's faith. *See Schempp,* 374 U.S. at 282-86 (Brennan J., concurring).

[14] Decisions of the former Fifth Circuit filed prior to October 1, 1981, constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

When these rights attach to students in school, they may engage in sectarian, proselytizing religious speech. And, of course, it is the duty of this Court and all other courts to protect these constitutional rights when and if they are impinged. There are, however, some limitations on the rights of students to engage in speech of any type while they are in school.

In *Tinker,* the Supreme Court recognized that public school students have free speech rights. See 393 U.S. at 511. However, the Court noted that "conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513. In *Bethel School District Number 403 v. Fraser,* 478 U.S. 675 (1986), the Court expounded on the limitations on students' free speech rights. The Court held that the free speech rights of students in school are not co-extensive with the free speech rights of adults. *Id.* at 682 (citing *New Jersey v. T.L.O.,* 469 U.S. 325, 340-42 (1985)). The Court noted that while students were free to advocate political and religious views outside of school, this right is tempered during school by "the sensibilities of fellow students." *Id.* at 681; *see also Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 266 (1988). The need to curtail controversial, disruptive or offensive speech is heightened when students are part of a "captive audience." *See*

Fraser, 478 U.S. at 684. Thus, even though the Establishment Clause places no limitation on purely "private" speech, in school, a student's right to espouse his or her religious beliefs is limited by the foregoing principles.

Whether a student's free speech rights attach, such that he or she is able to freely espouse his or her religious beliefs, is necessarily a factual inquiry. It cannot be determined in the abstract whether a school has created a limited public forum, *see Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46-47 (1983) (making factual inquiry), such that a student's speech cannot be curtailed on the basis of content, see 20 U.S.C. §§ 4071-4074; *Bd. of Educ. v. Mergens,* 496 U.S. 226, 253 (1990), or viewpoint, *see Rosenberger v. Rector and the Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2516-17 (1995).[15] Nor can it be determined in the abstract whether a student's private religious speech is disruptive or impinges the rights of other students. However, school officials should be particularly wary of these dangers when a student advocates his or her religious beliefs in situations where the student's peers are unable to move about freely (and thereby avoid listening to speech they find disagreeable) and/or when the student's peers are unable to freely express themselves in response (because school officials are actively controlling a particular setting).[16]

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[15] The Court notes that public schools are not traditional public fora. *See, e.g., Lamb's Chapel v. Center Moriches Union Sch. Dist.* 508 U.S. at 392; *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. at 267.

While a determination of the scope of students' free speech rights requires the Court to make a factual inquiry, the Court notes that there are many forms of student religious expression which should, generally, be permissible. As long as students abide by a school's generally applicable rules and regulations, students should ordinarily be permitted to engage in the following forms of religious expression:[17]

(1) individual or group prayer or religious discussion outside of organized classes or school-sponsored events;

(2) reports, homework and artwork which reflect students' religious beliefs;

(3) distribution of religious literature (provided that the school generally permits students to distribute other literature not related to the school curriculum and that

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[16] The Court would distinguish the above-described situations from those periods during which students are "in school" or attending a school-event but school officials exercise minimal supervisory control and students are free to move about as they please. During these latter times, e.g., in between classes or lunch (depending on the factual circumstances), the restrictions on students' free speech rights are limited; students should be able to engage in sectarian, proselytizing, religious speech as long as it is not, for reasons other than its content, disruptive (e.g., it is loud, the speaker is aggressive, etc.).

[17] This list is exemplary only; it is by no means intended to be a complete statement of permissible religious expression by public school students.

the religious literature is distributed in accordance with all applicable time, place and manner restrictions);

(4) display of religious symbols, articles and medals (e.g., Crosses, Stars of David, St. Christopher and other religious medals, even replicas of the Ten Commandments) and/or clothing bearing religious messages (provided that the school allows students to display non-religious expressive symbols and apparel and such display is in accordance with all applicable time, place and manner restrictions); and

(5) religious activity permitted by the Equal Access Act.[18] Additionally, students may pray silently at any time so long as it does not interfere with their school work.

In providing this list, the Court has attempted to illustrate generally permissible, private student religious expression. The Establishment Clause does not prohibit such expression. The Establishment Clause does, however, unequivocally prohibit state sponsored religious expression in public schools. The principles found in the cases discussed above, *Lemon, Lynch* and *Lee,* help the

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[18] The "Equal Access Act," 20 U.S.C. § 4071(a), makes it unlawful for any public secondary school which receives federal financial assistance and which has created a limited public forum to deny access or discriminate against students who wish to conduct a meeting in that limited public forum on the basis of religious, political, philosophical, or other speech content. The Act contains a number of qualifications and emphasizes that official involvement in the student meetings must be non-participatory and strictly limited. *See* 20 U.S.C. §§ 4071(c) and (d).

Court identify those situations which implicate this forbidden activity. With this in mind, the Court returns to the question of whether, on its face, § 16-1-20.3 of the Ala.Code is constitutional.

The first question a court must ask of challenged legislation is whether it was enacted for a secular legislative purpose. *Lemon,* 403 U.S. at 612. "In applying the purpose test, it is appropriate to ask 'whether government's actual purpose it to endorse or disapprove of religion." ' *Wallace v. Jaffree,* 472 U.S. at 56 (quoting *Lynch,* 465 U.S. at 690). While courts should normally be deferential to a legislature's stated purpose, the statement of such purpose must be sincere and not a sham. *Edwards,* 482 U.S. at 586-87.

Section 16-1-20.3(a) is a statement of legislative purpose. This section provides:

> The legislative intent and purpose for this section is to protect the freedom of speech guaranteed by the First Amendment to the United States Constitution and Article 1, Section 4 of the Constitution of Alabama of 1901, to define for the citizens of Alabama the rights and privileges that are accorded them on public school and other public property and at school-related events, and to provide guidance to public school officials on the rights and requirements of law they must apply. Further, the intent and purpose of the Legislature is to properly accommodate the free exercise of religious rights of its student citizens in the public schools and at public school events as mandated by the First Amendment to the United States Constitution and the

> judicial interpretations thereof as given by the United States Supreme Court.

It is clear from this statement that the Alabama legislature sought to articulate a secular purpose for enacting § 16-1-20.3, and thus, distinguish this statute from its predecessor, § 16-1-20.1, which the Supreme Court held was not enacted for a secular purpose. *Jaffree,* 472 U.S. at 61. Section 16-1-20.1 provided that in public schools, at the beginning of each day, a moment of silence would be set aside for meditation or voluntary prayer. The statute's legislative history revealed that it was enacted to return voluntary prayer to Alabama's public schools. *Id.* at 56-58. This purpose was confirmed when the Court considered the statute's relationship to other state laws. Prior to enacting § 16-1-20.1, Alabama already had a law which set aside a moment of silence at the beginning of the school-day. *See* Ala.Code § 16-1-20. All that was added by enacting § 16-1-20.1 was to make explicit that the moment of silence could be used for voluntary prayer. *Jaffree,* 472 U.S. at 58-59. Of course, students already enjoy a constitutional right to voluntarily engage in silent prayer. See *supra* at 6-7, 21. The Court noted that § 16-1-20 did nothing to abridge this right. *Jaffree,* 472 U.S. at 59. The Court concluded, therefore, that § 16-1-20.1 was enacted to emphasize that public school students have a right to pray, and that this was not a secular purpose. *See id.* at 59-61.

In *Ingebretsen v. Jackson Public* Sch., 88 F.3d 274, the Fifth Circuit had before it a facial constitutional challenge to a statute strikingly similar to the one before this Court. The statute at issue in *Ingebretsen,* Miss.Code Ann.

§ 37-13-4.1, contained a statement of legislative purpose which was almost a verbatim copy of the statement quoted above. *See* § 37-13-4.1(1).[19] Nevertheless, the court found that the statute was not enacted for a secular purpose. *Ingebretsen,* 88 F.3d at 279. The court stated:

> The legislature declared that its purpose in enacting the School Prayer Statute was 'to accommodate the free exercise of religious rights of its student citizens in the public schools.' This statement of purpose cannot be characterized as 'secular' because its clear intent is to inform students, teachers and school administrators that they can pray at any school event so long as a student 'initiates' the prayer (ostensibly by suggesting that a prayer be given).

Id. (citation omitted). The same can be said about § 16-1-20.3 of the Alabama Code. Although the statement of purpose proclaims the statute was intended to protect

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[19] Section 37-13-4.1(1) provides:

> The legislative intent and purpose for this section is to protect the freedom of speech guaranteed by the First Amendment to the United States constitution, to define for the citizens of Mississippi the rights and privileges that are accorded them on public school property, other public property or other property at school-related events; and to provide guidance to public school officials on the rights and requirements of law that they must apply. The intent and purpose of the Legislature is to accommodate the free exercise of religious rights of its student citizens in the public schools and at public school events as provided to them by the First Amendment to the United States Constitution and the judicial interpretations thereof as given by the United States Supreme Court.

"freedom of speech," the only speech which the statute "protects" is religious speech. The statute does nothing to secure students' general free speech rights. Because the statute does not further its stated purpose, the purpose may properly be disregarded. *See Edwards,* 482 U.S. at 586; *see also Black Horse,* 84 F.3d at 1484-85 (holding that school board policy which allowed students to decide whether to have prayer at graduation is unconstitutional, wherein court disregarded asserted secular purpose of protecting free speech rights because policy did not address students' general free speech rights at graduation and only impacted religious speech). The Court does not believe that singling out one type of speech, religious speech, and informing school officials and the public that students have an unqualified right to engage in this one type of speech, constitutes a secular purpose. Instead, by singling out religious speech, § 16-1-20.3 endorses religion. *See Jaffree,* 472 U.S. at 60.

The legislature's statement that § 16-1-20.3 is an effort to accommodate students' free exercise of their religious rights does not save the statute. As the *Ingebretsen* Court noted, informing students that they have the right to pray at any school event is not a secular purpose. 88 F.3d at 279. Furthermore, government properly "accommodates" religion only when the free exercise of religion is in some way burdened. *See, e.g., Jaffree,* 472 U.S. at 57 n. 45; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in judgment); *Thomas v. Review Bd. of Indiana Employment Security Division,* 450

U.S. 707, 717-18 (1981). Here, there has been no showing that the Free Exercise rights of the students in Alabama's public schools[20] have been burdened.[21] Therefore, the claim that § 16-1-20.3 is intended to protect students' Free Exercise rights cannot be regarded as a legitimate secular purpose. *See Jaffree*, 472 U.S. at 57 n. 45.

Moreover, the sectarian origins of § 16-1-20.3 are revealed in a letter from the Alabama Attorney General to the law's sponsor, Representative Bill Fuller. In this letter, the Attorney General, at the behest of Rep. Fuller, evaluated the constitutionality of a draft bill with language similar to that which appears in § 16-1-20.3(b). The letter states (referring to Rep. Fuller): "You ask: What is the strongest, clearest constitutional language which Alabama might enact restoring student prayer to public schools?" Ex. A attached to Gov.'s and Atty. General's Resp. Br. on Constitutionality of Ala.Code § 16-1-20.3 (emphasis added). Restoring prayer to public schools is a patently non-secular purpose. *See Jaffree*, 472 U.S. at 56-60.[22]

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[20] As noted earlier, the Court stands ready, willing and able to protect these rights when and if they are impinged. *See supra* pp. 18-19.

[21] The only "burden" on students' free exercise rights which the Court can discern is that imposed by the Establishment Clause. However, this is a "burden" which the state of Alabama cannot remove. *Jaffree*, 472 U.S. at 83-84 (O'Connor, J., concurring).

[22] The Court recognizes that a statement of purpose by one legislator is not equivalent to a statement of legislative purpose. *See Mergens*, 496 U.S. at 249. Nonetheless, the Court finds a statement of purpose made by the sponsor of § 16-1-20.3, which was submitted to the Court by the defendant, to be relevant to the question of legislative purpose.

A statute which lacks a clearly secular purpose is unconstitutional on its face. *See Edwards*, 482 U.S. at 594; *Jaffree*, 472 U.S. at 56-60. Here, although the Alabama legislature sought to recite a secular purpose for enacting § 16-1-20.3, the Court finds that the preeminent purpose behind the statute was to endorse religion. Accordingly, the Court finds that § 16-1-20.3 violates the Establishment Clause. *See Edwards*, 482 U.S. at 590-94; *Jaffree*, 472 U.S. at 56-61; *Stone*, 449 U.S. at 41-43; *Jager*, 862 F.2d at 830; *Karen B.*, 653 F.2d at 901.[23]

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[23] The instant case is distinguishable from *Bown v. Gwinnett County Sch. Dist.*, 895 F. Supp. 1564 (N.D. Ga. 1995), where the court found that a statute which provided for a moment of silence at the beginning of the school day, was enacted for a secular purpose. Setting aside a moment of silence so that students can reflect on the anticipated activities of the day is, arguably, a secular purpose. *See Jaffree*, 472 U.S. at 72-73; but see Gilbert A. Holmes, *Student Religious Expression in School: Is it Religion or Speech. and Does it Matter*, 49 U. Miami L. Rev 377, 411 n. 202, 412 n. 208 (1994) ("moments of silence serve a reverent purpose"). The statute at issue in *Bown* clearly served that purpose. See Ga.Code Ann. § 20-2-1050(a). In the instant case, § 16-1-20.3 does not serve the asserted secular purpose for which it was enacted, to protect students' free speech rights. Therefore, in the instant case, unlike *Bown*, the legislature's asserted secular purpose does not control the Court's inquiry.

Even if § 16-1-20.3 were enacted for a wholly secular purpose, the Court would still be compelled to find the statute unconstitutional because the Court finds the primary effect of § 16-1-20.3 is to endorse religion and the Court finds that § 16-1-20.3 results in excessive entanglement between the state and religion. *See Lemon,* 403 U.S. at 612-13. Irrespective of the State's actual purpose, if legislation conveys either a message of endorsement or disapproval of religion it is unconstitutional. *Jager,* 862 F.2d at 831 (citing *Jaffree,* 472 U.S. at 56 n. 42).

The effect of § 16-1-20.3(b) is to permit students to pray at school-related events, compulsory or non-compulsory, as long as the prayer is non-sectarian and non-proselytizing. The statute singles out prayer as the one form of student speech which must be permitted at these school events. Prayer is unquestionably a religious practice. *Engel,* 370 U.S. at 424-25; *Karen B.,* 653 F.2d at 901 ("prayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people"). It is clear, therefore, that the effect of the statute is to favor religion over non-religion, an effect which is prohibited by the Establishment Clause. *C.f. Mergens,* 496 U.S. at 249 (Equal Access Act not intended to endorse religion because "the Act on its face grants equal access to both secular and religious speech").

A second effect of § 16-1-20.3(b) is to force nonconsenting students to listen to and/or participate[24] in prayer. The statute requires that prayer be permitted at school-events, including compulsory school-events.[25] Other students attending these school-events (those who do not wish to pray) will have no choice but to listen to the prayers of their peers.[26] Dissenting students will be unable to walk away, and presumably, will be unable to voice their dissent.[27] Thus, the effect of § 16-1-20.3 is to create a school system wherein public school students must, at the whim of their peers, participate in a religious practice. "It is beyond dispute that, at a minimum the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee,* 505 U.S. at 587. It is precisely this forbidden effect which § 16-1-20.3 creates.

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[24] Students are not compelled under § 16-1-20.3(b) to verbally join their peers when they choose to pray at a "school-related" event. However, at a compulsory event, a student who did not wish to pray would have no choice but to remain and listen to his or her peers' prayers. Because the statute gives students the absolute right to pray at such events, a dissenting student could not protest another student's prayer. Unable to interfere with the absolute prayer right provided in the statute, the dissenting student would have to remain silent, while his or her peers, perhaps a majority of his or her peers, prayed. In the face of such prayer, a student who remains silent may very well feel as though he or she has participated in the religious activity by acquiescence. *See Lee,* 505 U.S. at 593. Regardless of whether the dissenter is characterized as "participating" in the prayer, a student is injured whenever the machinery of the state is used to force the dissenter to listen to prayer. *See id.*

[25] The Court notes that students may be functionally compelled to attend school-events even when these events are not technically compulsory. *See Lee,* 505 U.S. at 593-95.

[26] Indeed, § 16-1-20.3 does not contain the seemingly obligatory "opt-out" provision which frequently appears in this type of legislation. *See, e.g., Schempp,* 374 U.S. at 205; *Engel,* 370 U.S. at 423.

[27] Section 16-1-20.2 does not provide dissenting students with the right to verbally object to prayers offered at these school-related events. Moreover, since the statute mandates that students have the right to pray, school officials might find it

The foregoing analysis is not changed by the fact that under § 16-1-20.3 the students ultimately decide whether there will or will not be prayer at the referenced school-events (§ 16-1-20.3(b) refers only to student-initiated prayer). *See Collins v. Chandler Unified Sch. Dist.,* 644 F.2d 759, 760 (9th Cir. 1981), *cert. denied,* 454 U.S. 863 (1981). A practice which tends towards the establishment of religion cannot be made secular by delegating some aspect of the practice to non-governmental actors. *See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet,* 512 U.S. 687, 698-700 (1994); *Black Horse,* 84 F.3d at 1477. The state of Alabama, by enacting a statute which gives students the absolute right to pray at compulsory student events, has sown the seeds of religious establishment. That the final step is carried out by non-governmental actors is of no consequence.

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necessary to silence a dissenting student who interfered with this prayer right. The effect of such action would clearly be an endorsement of religion. *See Ball,* 473 U.S. at 389 (government promotes religion when it fosters a close identification between its powers and religion).

Nor is it of any significance that the statute only authorizes "non-sectarian, non-proselytizing" prayer. The Establishment Clause does more than protect against coerced indoctrination in one particular faith; as the Supreme Court has noted time and again, the Establishment Clause prevents government from favoring religion over non-religion. *E.g., County of Allegheny,* 492 U.S. at 591; *Aguillard,* 482 U.S. at 585; *Jaffree,* 472 U.S. at 53; *Committee for Public Educ. and Religious Liberty v. Nyquist,* 413 U.S. 756, 771 (1973) ("[I]t is now firmly established that a law may be one 'respecting an establishment of religion' even though its consequence is not to promote a 'state religion,' and even though it does not aid one religion more than another but merely benefits all religions alike.") (citations omitted); *Torcaso v. Watkins,* 367 U.S. 488, 495 (1961) ("[Government cannot] pass laws or impose requirements which aid all religions as against non-believers."). And, while the statute may not authorize student prayer which contains a coercive element, as the Court has discussed above, any prayer in a compulsory school setting may have a forbidden coercive effect.

Finally, § 16-1-20.3 is unconstitutional because it fosters excessive entanglement between religion and the state. The operative section of the statute, subsection (b), contains ambiguous terms such as non-sectarian and non-proselytizing.[28] Since the student speech permitted by

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[28] Contrary to defendants' assertion, the mere fact that the Supreme Court has uttered these words does not render them "safe to use in statutory form without fear of ambiguity." Gov. and Atty. General's Br. in Resp. to Pl.'s Mot. for Summ. J. on

§ 16-1-20.3(b) is limited to non-sectarian, non-proselytizing prayer, school officials will be forced to monitor the student prayers and decide which prayers are permissible.[29] Such action by school officials could lead impressionable schoolchildren to believe that permitted prayers are officially sanctioned. *See Karen B.*, 653 F.2d at 902.[30]

Constitutionality of § 16-1-20.3 at 23. The Court has not defined these words such that reasonable students who choose to pray and reasonable officials who must monitor those prayers could readily agree on their definition. Ironically, in *Lee v. Weisman*, to insure the "nonsectarian" nature of a graduation prayer, the school principal had to provide the clergyman selected to deliver the prayer with written guidelines on what would constitute a nonsectarian prayer. 505 U.S. at 588. It was, in part, the principal's provision of those guidelines which led the Court to declare the graduation prayers unconstitutional. *Id.*

[29] The Court notes that this task would be a difficult one. School officials may be no better able to identify "non-sectarian, non-proselytizing" prayers than the students making them. The task would be even more difficult where the official making the decision was unfamiliar with the prayer and religion in question. The resultant potential for inconsistent rules and favoritism among religions is further reason to question the statute.

[30] Like the Mississippi statute before the *Ingebretsen* Court, § 16-1-20.3 contains a number of ambiguities. In addition to those discussed above, the statute does not define "school-related events," nor does it define "student-initiated" prayer. This latter ambiguity is particularly troublesome as it could be construed to allow students to authorize third parties, such as clergymen or school officials, to deliver prayers in the public schools. *See Ingebretsen*, 88 F.3d at 280; *Ingebretsen v. Jackson Public Sch. Dist.*, 864 F. Supp. 1473, 1483 (S.D. Miss. 1994). This, of course, is an activity which has been expressly forbidden by the Supreme Court. *E.g.*, *Lee*, 505 U.S. at 599; *Schempp*, 374 U.S. at 223.

Furthermore, the review of prayers by government officials is one of the very practices which the First Amendment was designed to prevent. The framers knew that government involvement with one's religious practices would inevitably taint the sanctity of one's faith. *See Engel*, 370 U.S. at 431. The implementation of § 16-1-20.3 will require school officials to make content-based reviews of students' prayers. The framers believed that such review posed far too great a danger to our freedom of religion. The First Amendment prevents Alabama school officials from taking the very action which implementing § 16-1-20.3 would require.

In addition to monitoring the content of the student prayers, implementing § 16-1-20.3 will force school officials to monitor the conduct of dissenting students. If the guarantee of § 16-1-20.3(b) is to be given effect, school officials will have to prevent dissenting students from interfering with students who exercise their right to pray. This need to continually monitor both the content of the prayers and the conduct of dissenting students results in "excessive and enduring entanglements between state and church" which is forbidden by the Establishment Clause. *Lemon*, 403 U.S. at 619.

Thus, the Court finds that § 16-1-20.3 is unconstitutional because it (1) unreasonably restricts the private speech and religion rights of public school students; (2) was not enacted for a secular purpose; (3) has the primary effect of endorsing religion; (4) has the further effect of coercing public school students to participate in religious activity; and (5) creates excessive entanglement between religion and the state by forcing school officials to continually monitor both the content of prayer and the conduct of dissenting students. Nevertheless, the defendants urge the Court to give the statute a "narrowing construction" such that the statute is saved. In the alternative, the defendants assert that the Court should sever any portion of the statute which is unconstitutional leaving the remainder intact. Neither of these suggestions is tenable.

The defendants cite *United States v. Salerno,* 481 U.S. 739, 744 (1987), for the proposition that a reviewing court must uphold the constitutionality of a statute challenged on its face unless there is no set of circumstances under which the statute may be constitutionally applied. *Salerno* involved a facial challenge to the Bail Reform Act of 1984, 18 U.S.C. § 3141 et seq. *Id.* at 741. The Court stated that to successfully mount a facial challenge to the Act, the plaintiff had to establish that "no set of circumstances exist under which the Act would be valid." *Id.* at 745. However, the Court was careful to note that the case was not one which involved a challenge under the First Amendment. *Id.*

The Court does not apply the onerous *Salerno* test when a statute is challenged on its face as being contrary to the First Amendment. Instead, when a statute is challenged as violative of the Establishment Clause, the Court "assess[es] the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman." Bowen v. Kendrick,* 487 U.S. 589, 602 (1988).

When a statute is challenged under the Establishment Clause, the Court makes no distinction between a "facial" and an "as-applied" challenge. *Id.* at 600-01. Therefore, the inquiry in *Salerno,* whether there is any set of circumstances under which the statute could be constitutionally applied, is not relevant to the instant case. The standard to be applied is that set forth in *Lemon,* a task which the Court has undertaken above.[31]

The Court's analysis under *Lemon,* above, leads the Court to find that the statute cannot be saved by means of severing those portions of the statute which are unconstitutional. The Court has found that in enacting § 16-1-20.3 the Alabama legislature lacked a secular purpose. Because the statute as a whole is an effort to instill prayer in Alabama public schools, the statute as a whole is unconstitutional. *See Jaffree*, 472 U.S. at 61; *Ingebretsen*, 88 F.3d at 279. Moreover subsection (b) of the statute is the only operative portion of the statute. As discussed above, the effect of this subsection is to endorse religion and create excessive entanglement between the state and religion. Subsection (b), therefore, is plainly unconstitutional. The other subsections in § 16-1-20.3, SUBSECTIONS (A)[32], (C)[33], and (D)[34], clearly have no purpose other than to qualify subsection (b). Therefore, if subsection (b) is severed, the remaining subsections become meaningless. The Alabama legislature surely did not intend to enact a meaningless statute. *See Jaffree*, 472 U.S. at 59. Accordingly, the Court finds that the entire statute must be stricken as unconstitutional.

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[31] Assuming arguendo that the Court is bound to construe the statute to be constitutional if possible, the statute would still fail to survive the Court's review. Nothing short of completely rewriting the operative portion of the statute, subsection (b), will make the statute constitutional. This is a task which the Court will not undertake. *See Chapman v. United States,* 500 U.S. 453, 464 (1991).

Section 16-1-20.3(b) provides that students shall be permitted to engage in non-sectarian, non-proselytizing prayer at compulsory and non-compulsory school-related student events. As the Court's previous discussion demonstrates, under the dictates of the Establishment Clause and Supreme Court decisions, students do not have an absolute right to engage in such prayer. While the defendants argue that the statute does no more than recognize students' free exercise and free speech rights, the Court will not ignore the plain meaning of the statute. The United States Constitution reflects the fact that students have free exercise and free speech rights; section 16-1-20.3 both impinges these rights and authorizes religious activity in our public schools which is plainly unconstitutional.

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[32] The text of this subsection was fully quoted on page 24, *supra*.

[33] The text of this subsection was fully quoted on page 17 n. 12, *supra*.

[34] This subsection provides:

> The exercise of these rights on public school or other public property, or on other property for school-related activities, by students or others, shall not be construed to indicate any support, approval, or sanction by the State of Alabama, any political subdivision thereof, municipal corporation, governmental entity of any description, or any agent or employee of any governmental entity of the contents of any such prayer, invocation, benediction, or other activity, or be an unconstitutional use of any public school property or other public property, or be the promotion or establishment of any religion or religious belief.

Ala.Code § 16-1-20.3(d) (1995).

By enacting § 16-1-20.3, the Alabama legislature sought to return prayer to the State's public schools. However, one need not "return" something which was never absent. The Constitution guarantees that public school students have the right to "freedom of religion," and "freedom of speech." Under most circumstances, public school students have the right to engage in private religious speech of any type. Therein lies the great irony of § 16-1-20.3. The statute is unconstitutional because it unreasonably restricts the free speech and religion rights of Alabama's public school students.

The Constitution gives the people of Alabama the right to freely exercise their religious beliefs. The Constitution also guarantees that the State of Alabama cannot establish or endorse religion. It is the duty of this and every other court to uphold these rights if and when they are infringed. Here, the state of Alabama has infringed upon them both. Accordingly, Ala.Code § 16-1-20.3 is due to be stricken. It is as true now as when first stated by the late Mr. Justice Frankfurter, "[i]f nowhere else, in the relation between Church and State, 'good fences make good neighbors.' " *People of State of Ill. ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 232 (1948).

ORDER

For all of the foregoing reasons, it is CONSIDERED and ORDERED that plaintiff's motion for summary judgment on the constitutionality of Ala.Code § 16-1-20.3 be and the same is hereby GRANTED. The Court finds that § 16-1-20.3 is unconstitutional in that it violates the mandates of the First Amendment to the United States Constitution as interpreted by the United States Supreme Court and the Court of Appeals for the Eleventh Circuit.

It is further CONSIDERED and ORDERED that in light of this Memorandum Opinion, the plaintiff and the "Dekalb County defendants," within 15 days of the receipt of this Memorandum Opinion and Order, be and the same are hereby DIRECTED to engage in settlement negotiations and report to the Court the results thereof.

It is further CONSIDERED and ORDERED that the United States Marshall personally serve courtesy copies of this Memorandum Opinion and Order on:

(1) Honorable Forrest H. "Fob" James, Governor of Alabama;

(2) Honorable Don Siegelman, Lieutenant Governor of Alabama;

(3) Honorable James S. Clark, Speaker of the House of Representatives of Alabama;

(4) Honorable William H. Pryor, Jr., Attorney General of Alabama;

(5) Honorable Ed Richardson, Superintendent of Education of Alabama; and

(6) Honorable William P. Gray, Jr., legal advisor to Governor James.

DONE this the 12th day of March, 1997.

/s/ Ira DeMent
United States District Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, ARTICLE I

Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

UNITED STATES CONSTITUTION, ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

UNITED STATES CONSTITUTION, ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

DEFENDANT'S EXHIBIT
A

STATE OF ALABAMA
GOVERNOR'S OFFICE
MONTGOMERY 36130

FOB JAMES, JR.
GOVERNOR

June 23, 1997

Honorable Ira DeMent
United States District Judge
Post Office Box 2149
Montgomery, Alabama 36102

BY HAND-DELIVERY

RE: Chandler v. James, et al.; Civil Action No. 96-D-169-N

Dear Judge DeMent:

Pursuant to Your Order I have received a courtesy copy of your Memorandum Opinion and Order in this case. Thank-you for sending it to me. I must confess that I was not previously aware of the specific details of this case, or of the legal arguments which had been made in it on my behalf.

I have now read Your Opinion, though, and I see in it the integrity of motive which has long marked your service to our state and Nation, as well as your concern for religious freedom. It is out of respect for Your Honor, and out of confidence in the Court's integrity, that I write this letter.

In the case at bar, I share Your Honor's discomfort with the Alabama statute at issue, which I have now read and which purports to allow "non-sectarian, non-proselytizing student-initiated voluntary prayer". The statute seems to me to be anemic and beggarly. Prayer, if it is really prayer, is communication with God, not man, and is neither "sectarian" nor "proselytizing". *Infra* at 29. I therefore believe that the statute needs to be repealed, but also believe, for reasons which will be shown, that the Constitution vests that responsibility in the State of Alabama. In addition, I have been most concerned to hear that this case also involves prayers by teachers and coaches as well as students, all of whose prayers I have the utmost desire to protect.

One thing in particular struck me about Your Honor's Memorandum Opinion and Order. On page 3 in a footnote Your Honor wrote:

> The Court is keenly aware that the First Amendment directs that "**Congress** shall make no law..." U.S. Const. amend. I (emphasis added). However, *the Supreme Court has held* that the guarantees of the First Amendment, through the Fourteenth Amendment, are equally applicable as against the States. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). *(my emphasis added)*

Although your Honor noted it, the jurisdictional issue is most often overlooked.

The question I will put to Your Honor in the end, as I must also put to myself, since we both have sworn pursuant to Article VI to uphold "this Constitution" of the United States, is how we as constitutional officers can obey United States Supreme Court decisions which are **openly** based on these propositions antithetical to our *oaths of office*:

a.) that the judiciary is "the essentially disinterested, rational and deliberate element of our society";[1]

b.) that society's "older values" may not be "fully adequate" and may contain a "degree of deception";[2]

c.) that "obviously we Americans must accept that...'upon judges, and particularly Justices of the Supreme Court, rests a great share of the delicate responsibility of deciding what must be preserved and what must be changed, what we shall protect and what we shall abandon'";[3]

d.) that to "re-define" constitutional rights in "every generation" is the "business of judges",[4] and that the "legal profession" should "improve the understanding" of "some laymen" who "tend to assume" that "constitutional law... is fixed and certain";[5] and

e.) that "due process, to use the vernacular, is the wildcard that can be put to such use as the Judges choose".[6]

With these matters in mind, let me address what Your Honor described as the "landscape" of First Amendment "jurisprudence" on church-state issues.

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1 Brennan, William, Speech of November 21, 1982, at 18-19, attached hereto as Appendix I.

2 *Id.* at 5.

3 *Id.* at 18.

4 *Id.* at 16.

5 *Id.* at 17.

6 Douglas, William O., quoted in Forrester, W. "Are We Ready For Truth In Judging?" American Bar Association Journal 63 (1977): 1212.

Your Honor's awareness, already "keen", that the First Amendment operates as a restriction on federal power, may become more keen still as the Court realizes how the Supreme Court, in all of its school prayer and other church-state cases, has so assiduously avoided the First Amendment's legislative history. That legislative history could be said to begin with the Articles of Confederation.

The Framework Prior to the Constitution

With the Articles of Confederation, signed by each of the 13 States between July 9, 1778, and March 1, 1781, the States entered "into a firm league of friendship" and delegated some of their powers to the United States in Congress assembled, reserving to themselves every power not so delegated.

The power to legislate with respect to religion was not delegated to Congress under the Articles of Confederation. That power remained with the respective States, which had varying church-state frameworks, including several with officially established churches.

Thus, in May of 1784, after a representative of the Roman Catholic Church had requested permission from Congress to appoint a bishop in America, Congress responded that the request, "being purely spiritual...is without the jurisdiction and powers of Congress, who have no authority to permit or refuse it, these powers being reserved to the several States individually".[7]

The Constitutional Convention[8]

At the Federal Convention of 1787 delegates of 12 of the original 13 States drafted the U.S. Constitution which was later ratified by the highest authority of each of the 13 States, namely by a State ratifying convention elected by the people of each state. By this Constitution the people of the United States created a government of the United States to which they delegated certain governmental powers similar to those which the people had previously delegated to their State governments under State Constitutions. These federal powers are enumerated in the Constitution. In order to carry into execution these enumerated powers, Art. I, Sec. 8, Cl. 18 authorized Congress to make all laws which shall be "necessary and proper" for this purpose. These are the only "implied" or "inherent" powers possible in the Constitution.

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[7] Stokes and Pfeffer, Church and State in the United States (Harper and Row 1950, 1964), at 86.

[8] I want to acknowledge my indebtedness to the late Hermine Herta Meyer, a former justice department lawyer who in my first term illuminated for me the jurisdictional nature of the U.S. Constitution, whose work I liberally make use of herein.

Outside of the U.S. Constitution, no federal power can legitimately exist. See Reid v. Covert, 354 U.S. 1 (1957), wherein the Supreme Court said:

> The United States is entirely a creature of the Constitution. Its power and authority have no other source It can only act in accordance with all the limitations imposed by the Constitution. Id. at 5-6.

In The Federalist Papers, No. 45 (pp. 292-293 Mentor Book ed.), Madison explained that the powers delegated to the federal government by the proposed Constitution were few and defined, and were mostly over external matters, while the powers which were to remain in the State governments were numerous and indefinite. "The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the state".

The powers of government not delegated by the Constitution to the United States have remained in the States, where the people themselves are better able to hold their state and local officials accountable for their actions. The only Constitutional way to take any of these powers reserved to the people of each State is through a Constitutional amendment. The Supreme Court itself has admitted this in Ullmann v. United States, 350 U.S. 422, 428 (1958), where it said:

> Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.

The only legal way to amend the Constitution is that provided for by Art. V thereof. It is entrusted exclusively to persons elected by, and responsible to, the people and requires the consent of two-thirds of both Houses of Congress and of the Legislatures or Conventions of three-fourths of the States. The Constitution gives no power of amendment to the judiciary.

Moreover, the U.S. Constitution enumerates no power in the federal government to legislate with respect to "religion". This was evident, for example, in the Virginia Ratifying Convention when Patrick Henry objected that the proposed Constitution did not expressly protect religion. James Madison assured the Convention in response that:

> **There is not a shadow of right in the general government to intermeddle with religion.** Its least interference with it, would be a most **flagrant usurpation.** 5 The Writings of James Madison 176 (G. Hunt, ed. 1904). (emphasis added) (hereinafter **bold-type** or underlined quotations automatically indicate added emphasis)

Therefore, the **authority** of the people of each State to make their own laws respecting religion had remained unaffected by the new Constitution. But the people wanted an **explicit** Constitutional Amendment to make sure that no one would ever forget it.

The First Amendment's "Religion" Clause

The First Amendment was the idea of some of the state conventions which had ratified the new Constitution. The overriding purpose of its religion clause was to make sure that authority to make church-state policy in America would be diffused among 13 or more states and not concentrated in the central government. This is evident in the debates of the First Congress.

The first version of the religion clause which ultimately passed was introduced in the House by Madison on June 8, 1789, as follows:

> "The civil rights of none shall be abridged on account of religious belief or worship, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed". (1 Annals of Cong. 434).

The amendment was referred to a committee of eleven which reported back the following version:

> "no religion shall be established by law, nor shall the equal rights of conscience be infringed". (*Id.* at 729).

It was considered by the House on August 15, 1789, acting as a Committee of the Whole. Mr. Sylvester objected to it:

> "He apprehended that it was liable to a construction different from what had been made by the committee. He feared it might be thought to have a tendency to abolish religion altogether". *(Id.)*

Mr. Gerry said:

> "it would read better if it was, that no religious doctrine shall be established by law". (*Id.* at 730).

Mr. Sherman thought the amendment unnecessary because Congress had no authority whatever delegated to it by the Constitution to make "religious establishments". *Id.*

Madison then said:

> he apprehended the meaning of the words to be, that **Congress** should not **establish a religion, and enforce the legal observation of it by law**, nor compel men to worship God in any manner contrary to their conscience. **Whether the words are necessary or not, he**

> **did not mean to say, but they had been required by some of the State Conventions,** who seemed to entertain an opinion that under the clause of the Constitution, which gave power to **Congress** to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enabled them to make laws of such a nature as **might infringe the rights of conscience, and establish a national religion**; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit". (Id. 730)

Mr. Huntington feared, "that the words might be taken in such latitude as to be extremely hurtful to the cause of religion". For instance, "a support of ministers or building of places of worship might be construed into a religious establishment". "He hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all". (Id. 730-731).

Madison then suggested that the word "national" be inserted before the word " religion":

> "He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and **establish a religion** to which they would **compel others to conform**. He thought if the word "**national**" was introduced, it would point the amendment directly to the object it was **intended to prevent**". (Id. 731).

But there was objection to the word "national". The reason is explained by what happened at the Federal Convention of 1787. The so-called Virginia Plan, on the basis of which the Convention began its work, had proposed to establish a "national government" with a National Legislature which could "negative" all state laws which it believed contravened the Articles of Union. (1 Farrand 20-23)[9] Robert Yates, Chief Justice of New York, who was a participant in the Federal Convention wrote that Edmund Randolph, the sponsor of the Virginia Plan, had been candid that it was "not intended for a federal government---he meant a strong consolidated union, in which the idea of states should be nearly annihilated." (*Id.* at 24.)

When the delegates of some States perceived the implications of the Virginia Plan, Mr. Patterson of New Jersey submitted to the Convention the so-called New Jersey Plan which proposed to delegate to "the United States in Congress" additional enumerated powers, and under which the States would retain full power to make laws in all matters not delegated to "the United States in Congress", without any control by any central authority. (1 Farrand 242-245). While the new Constitution did create a central government, it left, however, to the States a residual sovereignty free from any federal control. In order to allay the concerns of people anxious to ensure that the new government was to be a "federal" and not a "national" government, the word "national" was removed from the final Constitutional plan and replaced with "the United States". (*Id.* at 334, 335)

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[9] Farrand, Max. *The Records of the Federal Convention of 1787*, Vol. 1, Yale University (1933 ed., reprinted 1966).

Thus what Madison had described as the fear that "Congress....might infringe the rights of conscience, and establish a national religion", *supra* at 6. was expressed, without the use of the word "national", in both the House's and Senate's final versions of the amendment, which were passed without further recorded debate. The final House version read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." (1 Annals of Congress 766) The final Senate version read, "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." *See Wallace v. Jaffree* ,472 U.S. 38, 96-97 (1985) (Rehnquist, C.J. dissenting).

A conference committee then met, *Wallace, id.*, at 97, and presented this version:

> **Congress** shall make no law respecting an **establishment of religion**
> or prohibiting the free exercise thereof.

In the late 18th Century, the term "establishment of religion" was well known as an equivalent expression for "national church". This is seen in the contemporaneous legal commentaries of William Blackstone, who used such terms as "national church", "ecclesiastical establishment", "national religion", "national establishment", and "established church" interchangeably.[10] An American edition of Blackstone was published in 1771-1772, attained immense American popularity from 1776 to 1787, and remained the core of a lawyer's professional education for over a century. *See* Solberg, *The Federal Convention And The Formation Of The Union* (Liberal Arts Press. Inc. 1958, at XLV).

The conference committee's version of the Amendment was adopted by the House on September 24, 1789, and by the Senate on September 25, 1789. (1 Annals of Congress 913-914). At that time, upon sending it to the States for proposed ratification, Congress called on President Washington to proclaim a "day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God". (1 Annals of Congress 949) This

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[10] Speaking of England's established church, Blackstone wrote...."I would not be understood to derogate from the just rights of the **national church**. I only mean to illustrate the excellence of our **present establishment**...... Under these restrictions, it seems necessary for the support of the **national religion**. that the officers of the church should have power to censure heretics, but not to exterminate them......Yet certainly our ancestors were mistaken in their plans of compulsion and intolerance. The sin of schism, as such, is by no means the object of temporal coercion and punishment. If .... men quarrel with the **ecclesiastical establishment**, the civil magistrate has nothing to do with it..... [But the civil magistrate] is bound to protect the **established church**....for, *if every sect were to be indulged in a free communion of civil employments. the idea of a **national establishment** would at once be destroyed*, and the episcopal church would no longer be the church of England...". 4 William Blackstone. Commentaries (1769), at 49. 52-53.

Washington did, urging all "...to unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech him to pardon our national and other transgressions..."[11]

Proposals To Amend The Constitution To Make The Religion Clause Applicable To The States

Having explicitly foreclosed federal authority to make church-state policy for the whole nation by the First Amendment, Congress and the ratifying States also undertook to prevent future unintended expansions of federal power by implication. They added the Ninth Amendment to assure that the particular exceptions to federal power in Amendments 1-8 would not themselves be used as an argument that powers not so excepted were given to Congress. (1 Annals of Congress 439). It read:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".

As an even further precaution, they added the Tenth Amendment, which like the previous nine, were meant to assure the nation that there was no surreptitious grant of federal power in the constitutional text:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

In submitting the first **ten** proposed amendments to the thirteen States on September 25, 1789, Congress wrote in preamble: "**The conventions of a number of states having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that proper declaratory and restrictive clauses should be added**: And as extending the ground of public confidence in the government will best insure the beneficent ends of its creation--" (1 U.S. Stat. At Large. p. 97)

Thus the "PEOPLE of the United States" who "ordain[ed] and establish[ed] this CONSTITUTION", had the right to expect that any change in the First Amendment (or any other constitutional provision) would not be made by "surreptitiousness", or by "deceit", but only by a Constitutional Amendment pursuant to Article V of the Constitution, that is, with the consent of two-thirds of Congress and at least three-fourths of the States.

Such a constitutional change to make the First Amendment's religion clause applicable to the States was attempted in 1875. In response to a recommendation of President Grant in his annual message (4 Cong. Rec. 175), the 44th Congress considered several resolutions for the adoption of such an amendment,[12] including one introduced by James G. Blaine which, as passed by the House, provided that "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof...... and that no money raised.... for the support of public schools....shall ever be under the control of any religious sect or denomination..." (4 Cong. Rec. 5580 (1876)). The proposal, after amendment in the Senate adding more restrictions on the states, failed to pass the Senate (4 Cong. Rec. 5595).

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[11] Richardson, J., *Messages and Papers of the Presidents*, Vol. I, 1789-1897, at p. 64 (1897).

This happened in the 44th Congress, only seven years after the ratification of the Fourteenth Amendment. During extensive debates no one in the 44th Congress even suggested, as the Supreme Court would later contend, *infra* at 11, that the Fourteenth Amendment had made the First Amendment's religion clause "applicable to the States". These debates from the Congressional Record are attached to this letter as Appendix II, and contain the following:

Senator Frelinghuysen of New Jersey, an amendment proponent, said:

> There is, sir. no room for two opinions on the two propositions that religion and conscience should be free. and that the people should not be taxed for sectarian purposes....and nothing could be clearer than that these fundamental rights should be secured in [the] Constitution....Thus the article as amended by the Senate prohibits the States. for the first time. from the establishment of religion. from prohibiting its free exercise, and from making any religious test a qualification to office. (4 Cong. Record 5261 (1876))

Senator Kernan of New York. an amendment opponent, said:

> "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State." That provision has my most hearty commendation; but for all that it is not necessary to put it in the Federal Constitution. That matter was discussed in the convention that made the Constitution, and it was not thought wise to put in any such provision. but to leave it to the States.....There is a provision in the constitution of [New Hampshire] that no one can be elected governor unless he is of the Protestant religion. and so as to members of the Legislature of the State. But I am willing to trust that to the people of that State, believing that very soon in this age of ours and in this country of ours

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[12] *See* Ames, *The Proposed Amendments to the Constitution of the United States during the First Century of its History*, H. R. Doc. No. 353. Pt. 2. 54th Cong.. 2d Sess.. pp. 277-78.

> they will adopt the liberal provisions which are found in the constitutions of the other States on the subject of the sacred rights of conscience. (4 Cong. Record 5581)

Senator Morton of Indiana, a proponent, said:

> What guarantee have we in the States? A majority of the people of a State can change the Constitution of that State and according to the doctrines we have heard here to-night, doctrines I think that will startle this nation, we are told that the States must be left free, if they desire to do so, to establish a church, to establish denominational schools, and maintain them at public expense....What is the reason the States cannot do it? He will say that in most of the constitutions there are provisions preventing them; but my friend knows very well that the majority who made those constitutions can unmake them. (4 Cong. Record 5591-5592)

Senator Bogy of Missouri, an opponent, said:

> And among the most sacred of these rights, lying at the very foundation of all liberty, was that of freedom of conscience and the right to worship God according to the dictates of each one's individual conviction. That was left to the States, and was not placed in the hands or under the control of the Federal Government. The attempt here to exercise this power takes from the States that right and gives it to the Federal Government.... For one hundred years the States have existed; and for all this time they have had the power of legislation on this subject; and who can rise in this Chamber and say within that long period of time any one of them has in any way whatsoever attempted in the most distant manner to trample upon the rights of conscience? Mr. President, the safety of this Government is in the denial of all such powers to the Federal Government. Keep it where the fathers placed it, in the States, and maintain it there..... (4 Cong. Record 5591)

If the adoption of the Fourteenth Amendment in 1868 had made the First Amendment's religion clause applicable to the States, no one in Congress in 1876 knew about it.

While President of the United States, George Washington said:[13]

> **The basis of our political systems** is the **right of the people** to make and **to alter their constitutions of government**. But the Constitution which at any time exists till **changed** by **an explicit and authentic act of the whole people** is **sacredly obligatory upon all......**

In 1962-1963, without an **"explicit and authentic act of the whole people"** (such as the failed Blaine Amendment, *supra*) applying the First Amendment's religion clause to the States, the U.S. Supreme Court nevertheless found an ***implicit*** federal judicial power to do it themselves. The Court held that the "establishment clause" of the First Amendment had been made "applicable" to the States by the Fourteenth Amendment, and that public prayer and bible reading in the schools of the American States "violated" the "establishment" clause.

In *Engel v Vitale*, 370 U. S. 421 (1962), Justice Black wrote the Court's opinion, which prohibited public prayer in the schools of New York. On 14 printed pages, he gave a historical review of the quarrels over the Book of Common Prayer in England and of the history of the early establishment and later rejection of official churches in the American States. But one thing he did ***not*** do was to look into the legal history of the "establishment" clause of the First Amendment in order to find out its intended meaning, for if he had, he would have found that its overriding purpose was to prevent a concentration of power in a central authority which might "establish" a national church. Also, Justice Black wrote that the provisions of the Fourteenth Amendment had "reinforced" the First Amendment's religion clause so as to make it applicable to the States, *id.* at 430, but he did ***not*** tell us how such a "reinforcement" had occurred.

In *Abington School District v. Schempp*, 374 U. S. 203 (1963), Justice Clark wrote the Court's opinion, which prohibited public prayer and bible reading in the schools of Pennsylvania. It is 22 printed pages long. But he too did **not** base it on the constitutional history and meaning of the First Amendment's religion clause. And in explanation of how the Fourteenth Amendment had made that clause applicable to the States, he referred to other cases where the Supreme Court had ruled that "the liberties guaranteed by the First Amendment" are "embraced" by the "fundamental concept of liberty" **implicitly** found in the **due process clause** of the Fourteenth Amendment. 374 U. S. at 215-216, citing at n. 8. *Gitlow v New York*, 268 U.S. 652, 666 (1925).

Thus it was through the **due process clause**, almost 100 years after it adoption in the Fourteenth Amendment, that the Court suddenly found **implicit** power to remove public prayer and bible reading from the schools of America, although the "people of the United States" had never approved an **"authentic** and **explicit"** constitutional amendment giving the Justices that power.

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[13] His farewell address is set out in more detail, *infra* at 17-19.

Due Process Of Law

After the Civil War, Congress proposed the Fourteenth Amendment, which was then ratified by the States.

The language of the Fourteenth Amendment contains only one provision of the Federal Bill of Rights (Amendments 1-8), namely the due process clause of the Fifth Amendment. In the Joint Committee on Reconstruction of the 39th Congress, where the Fourteenth Amendment was drafted, Representative Bingham of Ohio, who drafted what later became part of the first section of the Fourteenth Amendment, tried to add a second clause, namely the just compensation clause of the Fifth Amendment, by proposing, "Nor shall any State...take private property for public use without just compensation." (Journal of the Joint Committee on Reconstruction 29.) This was rejected.

No provision of the First Amendment, nor any other provision of the Federal Bill of Rights, was proposed for inclusion in the Fourteenth Amendment. Thus, the due process clause has remained the only provision of the Federal Bill of Rights which the Fourteenth Amendment has made applicable to the States.

The due process clause of the Fourteenth Amendment reads:

> "...nor shall any State deprive any person of life, liberty, or property without due process of law."

There was no discussion of the "due process" clause when the Fourteenth Amendment was debated in 1866 in the 39th Congress. However, five (5) years later, in 1875, in the 42nd Congress, a debate arose about the meaning of the first section of that Amendment.

Representative Garfield who had attended the debates of the 39th Congress which adopted the Fourteenth Amendment, said with respect to the due process clause that it was copied from the Fifth Amendment. There, it operates only as a restraint on Congress, while here it is a direct restraint on the States:

> "It realizes the full force and effect of the clause in Magna Carta, from which it was borrowed, and there is now no power in either the State or the national Government to deprive any person of...life, liberty and property, except by due process of law; that is by an impartial trial according to the laws of the land". (Cong. Globe,

42nd Cong., 1st Sess., App. 153 (1871))

The history of the due process clause shows that at the time of adoption of the Fourteenth Amendment the clause had maintained substantially the same meaning since its inception in the primordial forests of England and early formulation, at Runnymede, in Chapter 39 of the Magna Carta of 1215.[14]

One of the chief grievances of the baronage and commonality against King John was that he had violated their right to have law - habeat legem - that is court proceedings with judgment and proof, by issuing writs of execution without court proceedings. In Chapter 39 of the Great Charter, the barons forced the King to promise that no freeman should be arrested and imprisoned, or diseized or outlawed, or in any way destroyed, nor would the King himself go, nor send his men, to inflict punishment on him through the use of armed force, except by the lawful judgment of his peers and by the lex terrae (literally, "by the law of the land.").

In 1354, in the formal confirmation of "the Great Charter, and the Charter of the Forest, and all other statutes before this time made and used", 28 Edw. 3, c.1,3 (1354), King Edward III extended the benefit of the provision to any man "of what estate and condition that he be" and replaced "except by the lawful judgment of his peers and per legam terrae" with "without being brought in answer by due process of law". The right to answer meant the right to defend himself against an accusation and, in case of denial, have a proof procedure. By 1354 the old modes of proof of the Magna Carta had partly been abolished, partly died out, and had been replaced by other types of procedure: in the common law courts by the jury procedure, and in the King's Council by the ecclesiastical procedure which developed into the equity procedure. While the lex terrae had referred to a particular proof procedure, due process of law now referred to any regular procedure pursuant to law.

Several hundred years later, the expression "due process of law" was adopted by New York, and from there it got into the Constitution's Fifth Amendment,[15] which provides:

> no person shall....be deprived of life, liberty, or property, without due process of law.

When it became part of the Fifth Amendment the clause had essentially meant, since King Edward III's decree in 1354, that the authorities could not put any person to death, or into prison, or take away his property. without first giving him a trial in accordance with preestablished rules applicable to all alike.[16]

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[14] *See* Meyer, H.H., *The History And Meaning Of The Fourteenth Amendment* (Vantage Press 1977), at 125-149.

[15] *Id.* at 147-149.

Thus it made sense after the Civil War, in order to counteract the lawlessness against African Americans and others in certain States, to have a national rule that no U.S. citizen could be subjected to mob violence or otherwise deprived by State authorities of life, liberty, or property without the benefit of the same laws of that State as applied to its other citizens.

Even Supreme Court Justice Hugo Black, who very much wanted to find some basis to apply the provisions of the federal Bill of Rights to the States, had to admit the 700 year old legal meaning of "due process of law":

> Thus the origin of this clause was an attempt by those who wrote Magna Carta to do away with the so-called trials of that period where people were liable to sudden arrest and summary conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases. Chapter 39 of Magna Carta was a guarantee that the government would take neither life, liberty, or property without a trial in accord with the law of the land that already existed at the time the alleged offense was committed. This means that the Due Process Clause gives all Americans, whoever they are and wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures and applying valid pre-existing laws. *Duncan v. Louisiana*, 391 U.S. 145, 169 (1968) (Black, J., concurring).

When the Supreme Court interpreted the language of the due process clause with judicial integrity and gave the clause its legally recognized meaning, the Court held that it guaranteed to any person charged with a crime a trial pursuant to pre-established law. At the same time the Court also had to rule, based on the language and history of the Fourteenth Amendment, that this amendment had not made any other provisions of Amendments 1-8 "applicable to the States". *See **Walker** v. Sauvinet*, 92 U.S. 90, 93 (1875) (holding the Seventh Amendment inapplicable to the States); *United States v. Cruikshank*, 92 U.S. 542, 551, 553 (1875) (holding the First and Second Amendments inapplicable to the States); *Davidson v. New Orleans*, 96 U.S. 97, 105 (1877) (holding the Fifth amendment's "just compensation" clause inapplicable to the States); *Hurtado v. California*, 110 U.S. 516, 534-535 (1884) (holding the Fifth Amendment's "grand jury" provision inapplicable to the States).

In 1915, the Court said in Frank v. Magnum, 237 U.S. 309, 326 (1915):

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[16] *Id.* at 213.

> As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction according to established modes of procedure, is 'due process' in the constitutional sense.....[citing a long line of Supreme Court decisions].

As if to reaffirm such rulings, the Supreme Court stated in *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 543 (1922):

> .....as we have stated, neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about "freedom of speech" or the "liberty of silence"; nor, we may add, does it confer any right of privacy upon either persons or corporations.

And finally, in *Bartkus v. Illinois*, 359 U. S. 121. 124 (1959), the Supreme Court again explicitly rejected the notion that the "due process" clause had been intended to make other provisions of the Bill of Rights applicable to the states. Justice Frankfurter, speaking for the Court, wrote:

> We have held **from the beginning and uniformly** that the **Due Process Clause** of the Fourteenth Amendment **does not apply to the States any of the provisions of the first eight amendments as such**. The **relevant historical materials have been canvassed** by this Court and by legal scholars. **These materials demonstrate conclusively** that Congress and the members of the legislatures of the ratifying States **did not contemplate** that the Fourteenth Amendment was a **short-hand incorporation** of the first eight amendments making them applicable as explicit restrictions upon the States.

It is therefore clear, by the Supreme Court's own admission, that there is no constitutional provision which has made the religion clause of the First Amendment applicable to the States.

The above-cited rulings of the Supreme Court that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the other provisions of the first eight amendments, are irreconcilable with the Court's rulings in school prayer cases such as *Abington v. Schempp, supra*, that the clause did make the First Amendment applicable to the States.

The First Amendment reads:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievance."

The due process clause of the Fourteenth Amendment reads:

> "...nor shall any State deprive any person of life, liberty, or property without due process of law."

Any Supreme Court Justice who can read English and takes the trouble of reading the First and Fourteenth Amendments could easily see that the due process clause does not, like the First Amendment, prohibit any interference with the free exercise of religion, or freedom of speech, or of the press. On the contrary, the due process clause of the Fourteenth Amendment clearly authorizes the States to take freedom -- liberty --, but not without some procedure.

And if, as the Supreme Court has said, the free exercise of religion, freedom of speech and of the press were protected by the due process clause, that clause should read: "nor shall any State deprive any person of the free exercise of religion, or freedom of speech, or of the press without due process of law". That means that a State that provides for a procedure could take away the free exercise of religion, freedom of speech and of the press. That would be nonsense.

Nevertheless, the Supreme Court has said that prayers in State public schools violate the First Amendment's prohibition against Congress making any law respecting an establishment of religion, as made applicable to the States by the Fourteenth Amendment's due process clause. The only word which the two clauses have in common is the word "law". But, in the First Amendment the Constitution prohibits Congress from making certain laws, while in the Fourteenth Amendment's due process clause the Constitution tells the States that they must have certain laws. How can there by any connection between them? The truth is that there is no connection.

Where neither the language of a constitutional provision is considered, nor the intent of its framers, nor its history, we cannot very well speak of "constitutional law".

The Supreme Court itself has practically conceded that it had not given the due process clause its legal interpretation, but has assumed the right to read into it what, in the Court's opinion, are fundamental rights "**implicit** in the concept of ordered liberty". Bartkus v. Illinois, *supra*, at 127; Palko v. Connecticut, 302 U.S. 319, 324-325 (1937). In this way, the Supreme Court has enabled itself to create a "constitutional" issue and declare a federal or State law unconstitutional whenever the Court considers it to be "arbitrary, capricious, unreasonable, or oppressive" or, in the Court's belief, it "has no 'rational or justifying' purpose, or is offensive to a 'sense of fairness or justice'",[17] although the State law under scrutiny does not violate any constitutional provision.

By this practice, the Supreme Court of the United States has attempted to fundamentally change the Constitution of the United States. This, the real Constitution, is based on the principle of self-government of the people. In such a system, the decision as to what is "implicit in the concept of ordered liberty", is a policy decision and belongs to the people who make their will known through their elected representatives. In the judge-created substitute constitution, judges have arrogated to themselves the right to destroy a law enacted by elected representatives of the people, or the people themselves, because the judges disagree with their judgment as to what is in the interest of the people.

The Constitution has given the Supreme Court no authority to change it. The only legal way to change the Constitution is that prescribed by Article V, namely with the consent of two-thirds of Congress and of the legislatures of three-fourths of the States. By disregarding this constitutional mandate, the Supreme Court has acted against the Constitution, willfully forgetting that every judicial officer is solemnly committed by oath pursuant to Article VI, Clause 3, "to support this Constitution", that is the Constitution as written and as legally amended.

The Oath Of Office

In 1796, after leading the nation to Independence from Great Britain, serving as President of the Constitutional Convention of 1787 and twice as President of the United States, George Washington said his farewell to his fellow citizens on September 17 of that year:

> **Friends and Fellow Citizens:**
>
> The period for a new election of a citizen to administer the Executive Government of the United States being not far distant...I should now apprise you of the resolution I have formed to decline being considered among the number of those out of whom a choice is to be made........
>
> Here, perhaps, I ought to stop. But a solicitude for your welfare which cannot end but with my life, and the **apprehension of danger** natural to that solicitude, urge me.....to offer to your solemn contemplation and to **recommend to your frequent review** some **sentiments which are the result of much reflection**.....and which

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[17] Griswold v. Connecticut, 381 U.S. 479, 511 (1965) (Black, J., dissenting).

appear to me **all important to the permanency of your felicity as a people**.....

To the efficacy and permanency of your union a **government for the whole** is indispensable...... Sensible of this momentous truth, you have improved upon your first essay by the adoption of a Constitution of Government better calculated...for the efficacious management of your common concerns. This Government, the **offspring of our own choice**, uninfluenced and unawed, **adopted upon full investigation and mature deliberation**, completely free in its principles, in the **distribution of its powers**, uniting security with energy, and **containing in itself a provision for its own amendment**, has a just claim to your confidence and your support. **Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true liberty. The basis of our political systems is the right of the people to make and to alter their constitutions of government. But the Constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all......**

All obstructions...with the **real design to direct, control**, counteract, or awe the regular deliberation and action of the constituted authorities, are **destructive**......**They serve...to put in the place of the delegated will of the nation, the will of a party, often a small but artful and enterprising minority of the community**........They are likely in the course of time and things to become potent engines by which **cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people, and to usurp for themselves the reins of government**. destroying afterwards the very engines which have lifted them to **unjust dimension**.....

It is important...in those intrusted with its administration **to confine themselves within their respective constitutional spheres**, avoiding in the exercise of the powers of one department to encroach upon another. **The spirit of encroachment tends to consolidate the powers of all the departments in one and thus to create, whatever the form of government, a real despotism.** A just estimate of that **love of power** and proneness to abuse it which **predominates in the human heart** is sufficient to satisfy us of the truth of this position. **The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal against invasion by the others**, has been evinced by experiments ancient and modern, some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them. **If in the opinion of the people** the distribution or the modification of **the constitutional powers be in any way wrong, let it be corrected by an amendment** in the way which the Constitution designates. **But let there be no change by usurpation;**

> for this in one instance may be the instrument of good, it is the **customary weapon by which free governments are destroyed......** [18]
>
> Go. Washington

However, scarcely two (2) years after Washington's farewell to the nation, Justice Chase of the United States Supreme Court contended for the prerogative of the judiciary to strike down legislative acts which, though admittedly not violative of the Constitution, were nevertheless thought by the judiciary to be contrary to an extraconstitutional "social compact":

> There are acts [...although not expressly restrained by the Constitution...] which the federal or state legislatures cannot do, without exceeding their authority...An act of the legislature (for I cannot call it law), contrary to the great first principles of the social compact cannot be considered a rightful act of legislative authority. *Calder v. Bull.* 3 U.S. (3 Dall.) 386, 387-388 (1789):

Justice Iredell disputed this issue with Chase in the same case:

> If...the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standards; the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice...Id. at 398-399.

This exchange between Justices brings to mind the issue of whether the Constitution of the United States, as it says in its Article VI, is the "Supreme Law of the land". Washington so viewed it, and reached the conclusion that it was "**sacredly obligatory**" on all three branches of government and could only be "**changed by an explicit and authentic act of the whole people**". For Washington, "**change by usurpation**" at the hands of any constitutional officer was an act of lawlessness.

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[18] See Kaufman, B. A., Washington's Farewell Address: The View from the 20th Century (Chicago / Quadrangle Books / 1969), at pp. 15-30.

This was not so for Justice Chase, or for many Supreme Court Justices who have followed him. They have looked at the Constitution not as "law" but as a sort of ongoing negotiable contract, and have reasoned that they may, to meet the perceived exigencies of the times, change it (or more accurately ignore it) on a case by case basis. This has led to "judicial" decisions based on extra-Constitutional abstractions, like that suggested in *Calder*, such as "vital principle of republican institution", "natural equity", and "universal law", *Chicago, Burlington, and Quincy R..R.. Co. v. Chicago*, 166 U.S. 226, 235-236 (1897); rights "implicit in the concept of ordered liberty" and required by "the conscience of mankind", *Bartkus v. Illinois, supra,* at 127; *Palko v. Connecticut, supra,* at 323-325; and in Brennan's words, "concepts of natural law", "a moving consensus", and "rights" which "transcend the printed page". (Appendix I, at 9, 12, 18)

Perhaps it will be significant to Your Honor, and to others who read this letter, that in the foundational case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), which was rendered after *Calder v. Bull*, Chief Justice John Marshall firmly grounded the role of the American Judiciary in the Constitution alone, not in any extraconstitutional powers that the judiciary might wish to explore. He said:

> **It cannot be presumed that any clause** in the Constitution is **intended** to be without **effect**....
>
> That **the people** have an original right to establish, for their future government, such principles as, **in their opinion**, shall most condone to their own happiness is **the basis on which the whole American fabric had been erected**. .....The principles, therefore, so established, are deemed **fundamental**. And as the **authority** from which they proceed is **supreme**, and can **seldom act**, they are designed to be **permanent**.......
>
> The **original and supreme** will organizes the government, and **assigns to different departments their respective powers**......
>
> The Constitution is either a **superior, paramount law, unchangeable by ordinary means**....or is alterable when the legislature shall please to alter it.....5 U.S., at 174-177.

Then, reasoning that "an act of the legislature, **repugnant** to the Constitution, is **void**", **Marshall appealed to his oath of office** for authority to declare it so:

> ....the framers of the Constitution contemplated that instrument as a **rule of government** for the Courts, as well as the legislature. Why otherwise does it direct the **judges** to take an **oath** to support

> it? This oath certainly applies, in an **especial manner**, to their conduct in their **official** character. **How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swore to uphold?** *Id.*, at 177, 179.

Yes, how *immoral* to impose an oath of office on constitutional officers, and then require that they be *knowing instruments* for violating the oath they swore to uphold.

From the foregoing, it is clear that Marshall teaches that the Constitution, which is "permanent" and can only be changed by the "seldom act" of constitutional amendment rather than "ordinary means", has **well-defined** content as the "fundamental" law of the land. If the peoples' "supreme will", expressed in the Constitution, did not have well-defined content, then in no way could it be considered "permanent" or "fundamental"or even "amendable". Moreover, if it did not have well-defined content, in no way could it be considered "law" and thus binding on constitutional officers by their oaths of office.

Accordingly Marshall presupposes that the power of "judicial review" (as distinguished from judicial "construction" of ordinary legislation) can **only** be exercised when a legislative or executive action violates the well-defined "paramount law" of the land. Only then is the judiciary justified, on grounds of their oaths of office, to hold a *contrary* act of a coordinate branch of government "unconstitutional". If the peoples' "paramount law"---the Constitution---is not clear on a given point, then there is no basis for the judiciary to say **under oath** that a legislative or executive act is **contrary** to it, and thus **no basis** to hold the act unconstitutional.

The oath of office taken by judges pursuant to Article VI of the Constitution is to "this Constitution" alone. But in the church-state cases, the Justices have *avoided* the requirements of their constitutional oaths by *avoiding* the constitutional record itself.

In those church-state cases arising in the 50 states, the Court has *willfully* ignored the constitutional record, because that record "emphatically" vests legal jurisdiction over such cases in the States themselves, not in federal authorities. *Supra* at 4-10. In such cases the Constitution determines *who* will make church-state policies (all 50 States), not *what* those policies will be.

In 1925, rather than address the constitutional record, the Court suddenly announced:

> ...**we may and do assume** that....[provisions of the First Amendment]....are among the fundamental ...'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States....*Gitlow v. New York*, 268 U.S., at 666.

Thus out of the clear blue the Court staked its claim to take control of church-state cases in the

States, with no authority to do so from the people of the United States, or from the peoples' Constitution, but only from the Justices' willingness to "assume" whatever they wanted to "assume", in order to accomplish whatever they wanted to accomplish, with no limits to their "power" and no integrity in the "judicial" process.

Moreover, in those church-state cases arising in the U.S. territories and areas of federal municipal jurisdiction, the Court has *willfully* ignored the constitutional record, because that record clearly identifies the term "establishment of religion" with "national church" or "established church", and clearly reveals the framers' central focus to be not a "secular mandate" but the protection of rights of conscience from infringement by the federal government.[19] Thus the Court's majorities have also avoided the numerous early examples of Congressional or Presidential action favorable to "religion", such as the Northwest Ordinance of 1787 providing for the teaching of "religion and morality" in the schools of the U.S. territories (which the First Congress, the same Congress which drafted the First Amendment, re-enacted). See ***Wallace v. Jaffree*** ,472 U.S., at 100. (Rehnquist. C.J. dissenting).

Rather than adhere to the constitutional record. Justices such as Felix Frankfurter arrogantly announced:

> **We are all agreed** that the **First and the Fourteenth Amendments** have a **secular reach** far more penetrating in the conduct of Government than **merely to forbid an "established church."** *McCollum v. Board of Education of School District No. 71, Champaign County, Illinois*, 333 U.S. 203, 213 (1948) (Frankfurter, J. separate opinion).

Indeed Frankfurter and his colleagues "all agreed" among themselves to force a secular mandate on the nation, but the people of the United States never "agreed" to such a mandate.

The idea since 1962 that prayer in the public schools by willing teachers and students is an impermissible "establishment of religion" comes neither from the text of the Constitution, nor from any legally recognized meaning of the term "establishment of religion", nor from the congressional debates on the First Amendment. all of which the Supreme Court has most religiously" avoided in all their decisions for the last 35 years. This idea comes only from the ideological preferences of the justices, who regard themselves as "the essentially disinterested, rational and deliberate element of our society", a society which but for the justices' oversight, would hold on to "older values" too long. *Supra* at 2. For these Justices, their oath of office to support the Constitution as the well-defined and "permanent" law of the land, as explained so clearly by John Marshall in *Marbury*------means absolutely nothing.

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[19] Both Madison in the federal convention debates and Blackstone in his Commentaries, associate a *religious establishment* with an element of *compulsion*. For Madison, a "national religion" might "infringe the rights of conscience". *Supra* at 6. For Blackstone, a "national establishment" would "at once be destroyed" if its adherents did not enjoy favorable treatment in "civil employments". *Supra* at 7, n.10. Accordingly, the U.S. Constitution, in addition to the provisions of the First Amendment, specifically prohibits in Article VI a "religious test" as a "qualification to any office or public trust under the United States".

It should not therefore be surprising that former Justice Brennan, in his attempts to escape the obligations of his oath of office, contended that only "laymen" would think that "constitutional law" was "fixed and certain". *Supra* at 2. Was John Marshall a layman?

Perhaps it will also be significant to Your Honor, and to others who may read this letter, that in the almost 200 years since *Marbury*, **not once** has the U.S. Supreme Court **ever** quoted what Marshall wrote about the **constitutional oath** of office in that case.[20] Instead, the Supreme Court and other federal and state courts have cited *Marbury* hundreds of times for another proposition, namely, that "it is emphatically the province and duty of the judicial department to say what the law is". 5 U.S. at 177. This statement, which was rejected as dangerous by the nation's then President Thomas Jefferson,[21] was made by Marshall only in the context of the judicial duty to determine the "original and supreme will" of the people expressed in the Constitution. Later Supreme Court justices have divorced it from its context and perverted it to mean that "the law is what the judges say it is", even if what they say has no basis in the Constitution.

In so acting, the Supreme Court has in an odd way adopted the views of the southern secessionist John C. Calhoun. For Calhoun, the Constitution was not essentially "law" binding upon all, but a mere contract of which the states were the principals and the federal government was the agent. Therefore, he reasoned, if the federal government, in the opinion of the states, overstepped its authority, the states as principals were ultimately free to cancel the contract and take remedial action such as seceding from the Union. *See* Coit, M.L., *John C Calhoun* (University of South Carolina Press 1950), at 230-238.

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[20] We were not able to find such a case through computerized legal research (LEXIS).

[21] "....The Constitution intended that the three great branches of government should be.... independent of each other....Where different branches have to act....under any law, they may give to it different and opposite constructions....From these different constructions....less mischief arises than from giving any one of them a control over the others....On this construction....I shall ever act....against any control which may be attempted by the judges.... I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public, and denounced as not law...the doctrines of that case were given extrajudicially and against law, and their reverse will be the rule of action with the Executive...". Bergh 1:150 (1807), quoted in *The Real Thomas Jefferson* (National Center for Constitutional Studies 1983), at 536-537, hereinafter "*Jefferson*".

The Justices of the U.S. Supreme Court have surpassed the Calhounian doctrine that the States are accountable to no one but themselves under the Constitution, with their doctrine that every branch of government, federal or state, is accountable to no one but the justices. In their system, by admittedly reserving the right to change or ignore the meaning of Constitutional provisions as they see fit, the justices treat the Constitution as a contract which they may unilaterally "reform" to their wishes, not as a law binding on them as well as everyone else. The legislative and executive branches of government, in this system, are agents of the judiciary, and must carry out judicial orders. The Justices alone remain above the law.

This is exactly opposite to the understanding of George Washington, who spoke of the necessity of reciprocal checks in the exercise of political power...... and constituting each [branch of government] the guardian of the public weal against invasion by the others." *Supra* at 18.

Every year across America thousands of citizens raise their hands in oaths to tell the truth on the witness stands of American Courts. If they lie under oath, they do so upon criminal penalty of perjury. Every year, at the insistence of the U.S. Supreme Court, federal and state judges and other constitutional officers are required to violate *their* oaths of office in order to perpetuate the "constitutional" perjuries of the justices of that Court.

George Washington spoke of a time when "cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people, and to usurp for themselves the reins of government", and that "*change by usurpation*" was the "customary weapon by which free governments are destroyed". In opposition to this, Justice William Brennan told us that in our society "**obviously we Americans** must accept that...upon judges, and particularly Justices of the Supreme Court, rests a great share of the delicate responsibility of deciding what must be preserved and what must be *changed...*" *Supra* at 2. Was George Washington **an American**?

Wildcards And Metaphors

Late in his career on the Supreme Court, Justice William Douglas said publicly what had been known for decades in the higher echelons of the legal community: that "due process" was the "wildcard to be put to such use as the judges choose". *Supra* at 2. This meant that when the Supreme Court wanted to implement a particular social or political policy for the nation, the justices would first pick a case involving the issue in question, and then simply say that "due process" required the policy they favored. Then the Court would give their ideological reasons for the policy in a written Opinion. Finally they would insist that their Opinion, containing their ideological reasons for the policy, was now the law of the land and must be obeyed by the rest of society, at least until they changed their mind and made different policy in a new case. This is the sum and substance of modern American "jurisprudence".

However, the first case of which I am aware that the U.S. Supreme Court used "due process" as a "wildcard" was *Dred Scott v. Sanford*, 60 U.S. 393 (1857). In this case, the Court declared that a slave, Dred Scott, who had been taken by his owner to the northern territories did not become free under the terms of the Missouri Compromise, an Act of Congress which had prohibited the extension of slavery in those territories. The Court held that the Missouri Compromise had been "unconstitutional", for, the Court said, to deny the rights of a slave owner to take his slave "property" to the territories "could hardly be dignified with the name due process of law". *Id.* at 450. In other words, the Court discerned a fundamental right implicit in the due process clause------the right to hold "slave" property just like any other "property". *Id.* at 451. Then the Court used its newly announced fundamental "right" to hold "unconstitutional" a Congressional Act which was contrary to the political policy favored by the Court----- the extension of slavery to all the territories. In so ruling the Court helped precipitate the Civil War.

The Civil War did not stop, but only postponed, the Court's adventures with the due process clause. In fact, now there were two such clauses at the Court's disposal, one in the 5th Amendment to control Congress, and one in the 14th Amendment to control State authorities.

By the beginning of the Twentieth Century the Court's prevailing ideology had focused on "free" labor markets, which the Court wished to protect from State or Congressional regulation. Thus, from "due process", the Court created new and "fundamental" economic "rights" with which to strike down various laws the Justices opposed. The Court struck down laws prohibiting bakery employees from working more than 60 hours per week. *Lochner v New York*, 198 U.S. 45 (1905); laws prohibiting employers from requiring their employees to sign contracts to remain non-union, *Coppage v Kansas*, 236 U.S. 1 (1915); laws requiring employers to pay a minimum wage, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); and laws requiring bakeries to sell bread to the public within prescribed weight standards, *Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924).

Years later, the Supreme Court would chide itself for ever having been so presumptuous as to "substitute" its beliefs for those of legislatures:

> We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws....... Legislative bodies have a broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government'..... *Ferguson v. Skrupa*, 372 U.S. 726,729 (1963).

Of course the Court did not mean what it said in *Ferguson* in 1963, for even then, its Justices were embarking on their most expansive adventures yet with "due process". The United States Supreme Court, nine *distinguished* lawyers, went from protecting labor markets at the start of the Twentieth Century to protecting sex markets toward the Century's end. The Court's new "fundamental" rights included the right to pornography, *see Jenkins v. Georgia*, 418 U.S. 153

(1974) ("nudity alone is not enough to make material legally obscene...", *id.* at 161); the right to pornography consisting of "the graphic sexually explicit subordination of women" including, *inter alia*, "women.....as sexual objects who enjoy pain...or experience sexual pleasure in being raped", "women ....as sexual objects....mutilated...or dismembered....or severed into body parts", and "women...as being penetrated by objects or animals..", *see America Booksellers Association v. Hudnut*, 771 F. 2d 323, 324 (7th Cir. 1985) ("....Indianapolis left out of its definition [of pornography] any reference to literary, artistic, political, or scientific value", *id.* at 331), *affirmed* 475 U.S. 1001, 106 S. Ct. 1172 (1986); the right to birth control, *Griswold v. Connecticut*, *supra*; and the right to abortion as a means of birth control, *Roe v. Wade*, 410 U.S. 113 (1973).

The Court was again using its wildcard to transform American "culture" into what the Justices thought it ought to be. In the minds of the justices, mere "legislators", whether state or federal, were less capable than the justices themselves on "social" matters. As Brennan said, there was "a degree of deception" in the "older values", and it was up to the "legal profession" to educate America's "laymen" on the Court's role of "re-defining" constitutional provisions in "every generation". *Supra* at 2.

Thus the Court also decided that public prayer and bible reading in the schools needed to stop. The "religious function" must remain "altogether private", said the Justices in the *Schempp* case, 374 U.S. at 219.

Since **nothing** in American constitutional history gave the Justices the authority to say whether the prayers to God of U.S. citizens must be private as opposed to public, the Court simply feigned *legal* authority and invoked a nice-sounding metaphor with no legal content----the "wall of separation of Church and State". This metaphor, which does not appear in the U.S. Constitution, had been used by Thomas Jefferson in a letter to a Baptist group in Connecticut. *See Wallace, supra*, at 91-92 (Rehnquist, C.J., dissenting).

And of course, the Supreme Court did **not** quote what Jefferson *really* said, in his Second Inaugural Address no less, on the subject of **constitutional** authority to act "in matters of religion":

> In matters of religion I have considered that its free exercise is placed by the constitution independent of the powers of the general government. I have therefore undertaken on no occasion to prescribe religious exercises suited to it, but have left them, as the constitution found them, under the direction and discipline of the **church or state authorities** acknowledged by the several religious societies. *See Inaugural Addresses of the Presidents of the United States* (Washington, D.C.: GPO, 1965), at pp. 17,18.

Nor of course, did the Court mention what Jefferson wrote about the tendency of the judiciary to become tyrannical:

> ....You seem...to consider the judges as the ultimate arbiters of all constitutional questions – a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy....Our judges are as honest as other men, and not more so....They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is, "Boni judicis est ampliare jurisdictionem"; and their power is the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that, to whatever hands confided, with the corruptions of time and party, its members would become despots.....Letter to Jarvis (1820), quoted in *Jefferson, supra* note 21, at p. 498.

If the Supreme Court is going to quote Jefferson, shouldn't they quote *all* of what he said which bears on the subject under discussion?

There is, however, ***constitutional*** language and history which does support what the Supreme Court has done in its church-state cases:

> For the purpose of securing ..... **real** freedom of conscience, the **church is to be separated from the state** and the **school from the church**, and the right of religious and antireligious propaganda is accorded to every citizen. *Constitution of the Russian Socialist Federated Soviet Republic*, Article Two, Para. 13 (1918).

Accord Engel v. Vitale, supra: Abington v. Schempp, supra; *Jaffree v. Wallace*, 472 U.S. 38 (1985); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Stone v. Graham*, 449 U.S. 39 (1980).

As the Supreme Court said in *Schempp*:

> secular education...[must]...be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and **lofty** neutrality as to religion. The assumption is that after the individual has been instructed in **worldly wisdom** he will be better fitted to choose his religion. 374 U.S. at 218.

Yes, Mr. Supreme Court Justice, we have seen what 35 years of your "worldly wisdom" has done to the schools of America.

Undoubtedly the Justices regard **their** role, in relation to things of the Almighty, to be **"lofty"**. They alone reserve the right to say when and where American citizens, such as school teachers and government officials, may pray. Who gave the Supreme Court this authority? Not the people of the United States.

George Washington, a man who could have had virtually unlimited power but refused it in favor of constitutional limitations, *publicly* and *officially* humbled himself before "the Great Lord and Ruler of Nations", asking "Him to pardon our national and other transgressions". *Supra* at 8. So did Lincoln.[22]

Hugo Black of Alabama and the other Justices, who through much deceit usurped power not given them by the Constitution, castigated "*official*" prayers of dependence on God as the "unhallowed perversions of a civil magistrate". *Engel*, 370 U.S. at 422, 425, 432.

Who was guilty of the "unhallowed perversion", Washington and Lincoln, or the Justices of the United States Supreme Court?

Bring Down The Wall

In the *Engel* case, the Supreme Court came out against public prayers in the schools because such prayers expressed a "religious belief", which in fact they did. The "belief" was the existence of God and public dependence on Him. 374 U.S. at 422, 430. Similarly, in the *Schempp* case, the Court forbade "all legislative power respecting religious belief or the expression thereof". 374 U.S. at 222. These statements express the Court's core ideology that the "religious function" must remain "altogether private". 374 U.S. at 219.

In both *Engel* and *Schempp*, and almost every other church-state case of consequence for the last 50 years, the Court has quoted heavily or cited with approval James Madison's *Memorial And Remonstrance Against Religious Assessments*, which Madison wrote in opposition to state taxation for the support of Christian ministers in Virginia. *See Memorandum Opinion*, at 4. One would assume, therefore, since the Supreme Court relies so heavily on this document, that it would contain strong statements **against** public expression of "religious belief" like those made by the Court in the *Engel* and *Schempp* cases.

But it does not. Instead, Madison's *Remonstrance* is **full** of expressions of **his** "religious beliefs". Indeed his *religious beliefs* form the conceptual basis for his opposition to compulsory support of churches, and for his view of religious freedom.

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[22] "...we have vainly imagined, in the deceitfulness of our hearts, that all these blessing were produced by some superior wisdom and virtue of our own. Intoxicated with unbroken success, we have become too self-sufficient to feel the necessity of redeeming and preserving grace, too *proud* to pray to the God that made us. It behooves us, then, to humble ourselves before the offended Power, to confess our *national sins*, and to pray for clemency and forgiveness...", quoted in Richardson, J., *Messages and Papers of the Presidents*. *supra* note 11. at p. 165.

For Madison, "God" is "Creator", "Governor of the Universe", and "Universal Sovereign".[23] *Remonstrance*, para. 1. Man's "duty" and "allegiance" to the Almighty precedes his duties to "civil society", which Madison describes as a "subordinate Association". *Id.* As to matters of man's religious *duty or allegiance*, such as tithing, "To God, therefore, not to men, must an account....be rendered."[24] *Id.* at para 4. With this the people of Alabama, the Alabama Constitution,[25] and I, all agree.

But the Supreme Court must not agree, because it dares to forbid prayer to the "Universal Sovereign", an authority----according to Madison---much higher than the Supreme Court. Prayer is rendered to God, not to men. The Supreme Court, a mere human court, has no "jurisdiction" over it or authority to forbid it. But in the *Engel* case, the Court did forbid prayer by saying that it was too "personal"and too "sacred" for "public" or "official" expression. 374 U.S. at 432. Whether prayer is "personal" or "relational", "individual" or "corporate", "private" or "public", is up to those who pray and the God to Whom they pray, and not to the Supreme Court.

Individual prayers like those of the sinner who fell down silent and alone in repentance before God in the Temple (Luke 18: 9-14), or public and joyful prayers like those of the children of Israel in the Psalms of ascension to Jerusalem (Psalms 120-134), or "official" prayers of national repentance offered by American Presidents such as Washington and Lincoln, or the heartfelt prayers of teachers, coaches, or students in the schools, are all beyond the reach of the Justices.

The Constitution is a charter of positive law, that is, law "ordained and established" by the "people of the United States". Its jurisdictional provisions place exclusive **constitutional** authority in the people of each state to decide whether they will permit, or even forbid (tragically), prayers in the schools of their state. Do not think I am asking Your Honor to base your ruling on anything other than the U.S. Constitution. I am not. But having said this, I also will say why, as a State Governor, I reject the personal ideologies of Supreme Court Justices who say that public prayers by those in positions of authority should be prohibited.

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[23] We also see Madison "earnestly praying" that the Almighty, by "illuminating" the Virginia legislature, would "turn their councils from every act which would affront his holy prerogative" and "guide them into every measure which may be worthy of his [blessing]". *Id.* at para.15.

[24] *Compare* "Render therefore to Caesar the things that are Caesar's, and to God the things that are God's." Matthew 22:21

[25] *See* Alabama Constitution, Preamble (invoking guidance of Almighty God); Art. I. Sec 1. (Recognizing endowment by Creator of inalienable rights); Sec. 3. (Prohibiting religion established by law, compulsory tithing, religious test for public office, or religious qualification for civil rights).

It is a cause for hope when the people themselves and their constitutional officials, in recognition of their own limitations, acknowledge that the "Church is greater than the State". The recognition by those in authority of a higher "authority" or "sovereignty" was expressed in the Declaration of Independence,[26] came to America from Judeo-Christian history, and is as old as the bible itself, for instance:

> 2 And a certain centurion's servant, who was dear to him, was sick and ready to die.
> 3 So when he heard about Jesus, he sent elders of the Jews to him, pleading with Him to come and heal his servant.
> 4 And when they came to Jesus, they begged Him earnestly, saying that the one for whom He should do this was worthy,
> 5 "for he loves our nation, and has built us a synagogue."
> 6 Then Jesus went with them. And when He was already not far from the house, the centurion sent friends to Him, saying to Him, "Lord, do not trouble Yourself, for I am not worthy that You should enter under my roof.
> 7 "Therefore I did not even think myself worthy to come to You. But say the word and My servant will be healed.
> 8 " For I am a man placed under authority, having soldiers under me. And I say to one, 'Go', and he goes; and to another, 'Come', and he comes; and to my servant, 'Do this', and he does it.
> 9 When Jesus heard these things, He marveled at him, and turned around and said to the crowd that followed Him, "I say to you, I have not found such great faith, not even in Israel!"
> 10 And those who were sent, returning to the house, found the servant well who had been sick.
>
> Luke 7:2-10 (NKJ)

Only the Spirit of God can heal the kid hurting from a broken family, deliver the hopeless addict, set free the emotionally bound, restore the ruined life, bring order to the schools, or peace to the streets. We will have no justice in our Courts, or integrity in our government, without the blessing of God upon us. This, America recognized for most of her history. This, the Supreme Court has unconstitutionally opposed with all its power.

The Supreme Court recognizes no authority greater than itself. Not the Constitution. Not the Almighty. In the name of "separation of Church and State", the Court seeks to rule the Church. It tells the believing community---the church-----where and when they may not pray.[27] How dangerous a situation when human government steps over this line. The Supreme Court ignores Madison about "the equal right of every citizen to the free exercise of his religion according to the dictates of conscience". *Remonstrance*, para.15. This "equal right...of conscience" is as true on public ground as on private.

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[26] Those who declared independence from Great Britain in 1776 appealed to "the Supreme Judge of the world for the rectitude of our intentions".

[27] *Compare* Daniel 6:1-28.

There is no difference in a majority compelling a minority to perform a "religious" duty, and a minority preventing a majority from exercising their faith according to their consciences.

In 1982, during my first term as Governor, the Alabama Legislature passed a law at my request which recognized the rights of willing teachers and students to pray to God in the schools. During legislative hearings on the proposed law, we pointed out that when the President of the United States, Ronald Reagan, had been shot a couple of years earlier, no one knew for several hours whether he would live or die. Those teachers in Alabama who stopped their classes to pray that the Almighty would spare the life of the President, supposedly acted "unconstitutionally" and could have been sued under "precedents" of the U.S. Supreme Court. These prayers were motivated by the desire that God would spare the life of the President. What court on earth really had jurisdiction over these prayers? None according to Madison's reasoning. Yet the Supreme Court forbids such prayers.

In forcing the silence of millions of American citizens, the Justices of the United States Supreme Court have fully brought upon themselves the condemnation of James Madison:

> The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves. *Remonstrance*, at para. 2.

In the Twentieth Century, a secular tyranny overwhelmed much of Europe. There, tyrants built a Wall of Separation. It has now fallen. The Wall of Separation erected by the United States Supreme Court still stands. It separates the people of the United States from their Constitution and from religious freedom. Let it fall.

Restore The Foundation

Your Honor, the Constitution of the United States is not a "wildcard". It is the **Supreme Law** of the land. Wildcards belong in casinos, not in the judicial branch of government.

The Supreme Court's use of the due process clause or *any* constitutional provision as a wildcard is, in the words of Washington, an "obstruction....with the real design to...control...the regular deliberation and action of the constituted authorities." *Supra* at 18. It is "destructive". *Id.* It puts "in the place of the delegated will of the nation, the will of a party...; a small but artful and enterprising minority of the community". *Id.*

It renders meaningless what John Marshall described in *Marbury* as "the greatest improvement on political institutions---a written Constitution,....in America. where "written constitutions have been viewed with so much reverence...". 5 U.S. at 178.

It rests not on a principle of law but a tenet of jackleg anthropology: that the legal profession and its judges are more "rational" and "deliberate" than the rest of society. *Supra* at 2. It is an arrogance that makes the publicized commitment of the legal profession and judiciary to their own canons of *ethics* subject to mockery by the society they serve. It disgraces the thousands of lawyers who will swear to their own hurt to keep their integrity, and of judges, state and federal, who cannot be bought with money, fame, or illicit power.

John Marshall always presumed that the judiciary would act with total integrity to apply the Constitution, as he had said in *Marbury*, as the "original and supreme will" of the people, "fundamental" and "permanent" in its "distribution of powers" among the branches--- America's "paramount law, unchangeable by ordinary means". *Supra* at 20-21. But because he could not foresee judges to whom the judicial oath of office would be meaningless, he did not address the issue of what would happen if the ***Supreme Court***, rather than the Congress, attempted wholesale "change by usurpation" and rendered decisions decade after decade beyond constitutionally authorized "judicial" power. Such decisions "repugnant to the Constitution" would be just as "void", to use Marshall's reasoning in *Marbury*, as an unconstitutional legislative act. Also in such cases other constitutional officers, again to use Marshall's reasoning, would be required as a "rule of government" to act in accordance with their oaths to uphold a supreme authority, the Constitution, rather than "void" decisions of the Supreme Court.

What a noble and essential role the Judiciary could have served in this country if they had stayed true to their constitutional commission. When they spoke, their decisions would have carried great authority. Their influence would have tended to stabilize political dispute rather than exacerbate it. Their good faith and fidelity to their judicial duty would have engendered great deference, even when there was disagreement with them over a particular issue, from the other branches of government and from the people.

The exercise of true *judicial* authority depends on the judges' adherence to their oaths of office. *Marbury v. Madison*. Since the Justices of the Supreme Court have left their oaths of office far behind in their quest to find "fundamental rights" which change with the times, they have lost any legitimate power "to say what the law is". They cannot have one without the other.

In the final analysis, the oath of office is to "this Constitution", not to the Supreme Court. U.S. Constitution, Article VI.

The oath of office which commands obedience to the Constitution must also command opposition to the unrelenting lawlessness of any branch of government, including the Supreme Court. Those who would instead urge obedience to the Court, until such time as a constitutional amendment might be passed to "correct" the Court, only strengthen the Court in its lawlessness. You do not change the Supreme Law of the Land because it has been broken.

If for instance Congress decided to usurp judicial authority under the Constitution by appointing a special Congressional "court" to which Supreme Court cases could be further appealed, the remedy for Congress's usurpation would not be to amend the Constitution to correct a particular ruling of the illegal Congressional court. The remedy would be for all constitutional officers of integrity to resist, with all executive, legislative, and judicial authority at their disposal, the unconstitutional usurpation of judicial authority by Congress.

What has happened in this country is, rather than Congress setting itself up as a court, the Supreme Court has set itself up as a legislature, and indeed, a legislature which even assumes the power to amend the Constitution as it pleases. By these means the Justices have tasted unlimited power in American society, and they like it. By these means the Justices have taken from "the people of the United States" authority that belongs to the people alone under their Constitution.

Therefore I ask Your Honor in accordance with the judicial oath of office to dismiss this case for lack of a federal question. I have instructed my lawyers to file the appropriate Motion. I will also ask the judges of the Eleventh Circuit to do the same. Then I will ask the Justices of the Supreme Court to cease destroying the Constitution they have sworn to uphold.

Only if constitutional officers have the resolve to resist the Supreme Court will the foundation of constitutional rule be restored in the United States. The Supreme Court may well "respond" to lower judges who resist them by removing them from cases, but the Justices will do so at the expense of having their deceit brought increasingly into public awareness.

I am also copying this letter to the Honorable Justices of the Alabama Supreme Court in the hope that they too will follow their oaths of office and rule that there is no federal issue in the "Ten Commandments" case or other cases before them based on the U.S. Supreme Court's "prostitution" of the Constitution.[28]

There is an honor greater than the honor of peers.

Your Honor must choose between heeding Brennan and his peers, or heeding a mere "layman", George Washington, whose last speech was to entreat his countrymen that "the Constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all...".

Your Honor must choose between following Justice Felix Frankfurter's quest to decree "rights implicit in the concept of ordered liberty", or Justice John Marshall's principle that it is "immoral" to require judges to be "knowing instruments of violating the Constitution they swore to uphold".

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[28] Shortly before his death in 1982 Leon Jaworski wrote my attorneys, "I have long felt that leaning on the Fourteenth Amendment for support in depriving the states from determining the propriety of religion in public schools is an abomination. It distorts the meaning of the Fourteenth Amendment and prostitutes its use."

Do your duty, Your Honor, as I will do mine.

Former Justice Brennan closed his speech in 1982 (at p. 19) on what he called the "always old" but "never old" quest of the Supreme Court for "freedom" by quoting the Irish playwright Yeats. "Did you see an old woman going down the path?" Asked Bridget. "I did not," replied Patrick, who had come into the house just after the old woman left it, "But I saw a young girl and she had the walk of a queen."

Your Honor closed your Memorandum Opinion (at p. 38) by quoting Justice Frankfurter who, borrowing the words of the American poet Robert Frost, said, "If nowhere else, in the relation between Church and State, 'good fences make good neighbors'."

But I close with the words of the ancient psalmist and king of Israel, David, without whose kingdom neither Irish playwrights nor American poets would ever have known the light of free civilization--

> "The Spirit of God spoke by me,
> And His word was on my tongue.
> The God of Israel said,
> The Rock of Israel spoke to me:
> 'He who rules over men must be just,
> Ruling in the fear of God.
> And he shall be like the light
>   of the morning when the sun rises,
> A morning without clouds,
> Like the tender grass
>   springing out of the earth,
> By clear shining after rain.'
>
> 2 Samuel 23:2-4 (NKJ)

Respectfully Submitted:

Fob James, Jr.

Fob James Jr.

cc. Counsel of record
Justices of the Alabama Supreme Court

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

MICHAEL CHANDLER, et al.,)
)
Plaintiffs,)
) **CV 96-D-169-N**
v.)
)
FOB JAMES, et al.,)
)
Defendants.)

PERMANENT INJUNCTION

(Filed Oct 29, 1997)

In accordance with the court's previous opinions, as well as the record as a whole in this cause, it is CONSIDERED and ORDERED as follows:

1. The Defendant Governor of Alabama, his successors in office, and all those in active concert and participation with him or her are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code Section 16-1-20.3 and any regulations, directives, or policies implementing its provisions.

2. The Attorney General of Alabama, his successors in office, and all those in active concert and participation with him or her, including, but not limited to, all deputy and assistant Attorneys General, are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or

otherwise enforcing the provisions of Alabama Code Section 16-1-20.3 and any regulations, directives, or policies implementing its provisions.

3. The Defendant Alabama State Board of Education, its officers, agents, servants, employees, successors and assigns, and all those in active concert and participation with it are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code Section 16-1-20.3 and any regulations, directives, or policies implementing its provisions.

4. The Defendants, and each of them, Ed Richardson, Bradley Byrne, Stephanie Bell, G.J. "Dutch" Higginbotham, Ethel H. Hall, Willie Paul, David F. Byers, Jr., Sandra Ray, and Mary Jane Caylor, and each of their successors in office, and all those in active concert and participation with each are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code Section 16-1-20.3 and any regulations, directives, or policies implementing its provisions.

5. The Defendants, and each of them, DeKalb County Board of Education, Weldon Parrish, Willard A. Israel, Tommie Johnson, Mary Etta Bailey, Johnny Young, and Jimmy Wilbanks, and each of their successors in office, and all those in active concert and participation with each (including, but not limited to, principals, school administrators, staff and teachers employed, assigned, or utilized within the DeKalb County school

system) are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code Section 16-1-20.3 and any regulations, directives, or policies implementing its provisions.

6. The Defendants, and each of them, DeKalb County Board of Education, Weldon Parrish, Willard A. Israel, Tommie Johnson, Mary Etta Bailey, Johnny Young, and Jimmy Wilbanks, and each of their successors in office, and all those in active concert and participation with each (including, but not limited to, principals, school administrators, staff and teachers employed, assigned, or utilized within the DeKalb County school system) are herewith PERMANENTLY ENJOINED from each and all of the following activities, policies, practices, and conduct:

(a) *Regarding Classroom Activities and Instructional Settings.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or permitting, *school organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to:* vocal prayer; Bible and religious devotional or scriptural readings; distribution of religious materials, texts, or announcements; and discussions of a devotional/inspirational nature, regardless of whether the activity is initiated, led by, or engaged in by students.

This PERMANENT INJUNCTION DOES NOT proscribe the educational use of religious texts in the classroom to the extent that material so used is presented in an objective and academic manner, for example, as part of a course of study.

This PERMANENT INJUNCTION DOES NOT proscribe students' voluntary expression of their own religious beliefs in the form of homework, reports, artwork, or other school assignments as applicable and as academically appropriate.

This PERMANENT INJUNCTION DOES NOT proscribe the display of religious symbols, articles and medals (for example, Crosses and Stars of David) and/or clothing bearing religious messages (provided that the school allows students to display non-religious expressive symbols and apparel and such display is in accordance with all applicable time, place, and manner restrictions).

This PERMANENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. Section 4071 *et seq,* or to quietly engage in religious activity during noninstructional times, *so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves.* This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place, and manner restrictions imposed on student distributions of nonreligious materials, subject to the provisions of paragraph 6(e) below.

(b) *Regarding Graduation or Commencement Exercises.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, participating in, or permitting, prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises, regardless of whether such prayer, invocation, benediction, or devotional message is offered by clergy, a student, administrator, teacher, school employee, or non-school person, regardless of how such prayer, invocation. benediction, or devotional message is denominated, and regardless of whether a public-address system is used. The Defendants, and each of them, are specifically PERMANENTLY ENJOINED from permitting such activity at commencement or graduation exercises in the guise of valedictory, salutatory, historian, or similar student addresses and remarks.

This PERMANENT INJUNCTION DOES NOT proscribe a brief personal expression by a student which contains religious references during a commencement exercise or student address (for example, a student may express thanks to Deity for his or her academic success),[1] provided that such expression is not encouraged in any way by school officials and does not invite audience participation or response (for example, a student speaker may not invite the audience to participate with him or her in prayer or urge the audience to take a moment with him or her to thank Deity). Where enjoined activity by students occurs, it is CONSIDERED that school officials be and they are hereby ORDERED to take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of the violative conduct as it occurs and to deter similar conduct in the future.

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[1] This is but one example of a brief permissible reference by a student to Deity or religion. This example is not meant by the court to suggest any form of expression to any student or to suggest that this is the only such reference that would be permissible. It is intended to be illustrative only, and to assist school officials in complying with the terms of this PERMANENT INJUNCTION.

The Defendants, and each of them, are further PERMANENTLY ENJOINED from listing, announcing, or memorializing any religious activity or message on any commencement program at any DeKalb County school. The Defendants, and each of them, are specifically PERMANENTLY ENJOINED from printing baccalaureate announcements or commemorations or other materials regarding baccalaureate services on the commencement programs of DeKalb County public schools and from organizing or sponsoring any baccalaureate event (although they may attend). School officials are prohibited from encouraging or discouraging, directly, or indirectly, a student's attendance at baccalaureate services. Specifically, school officials may not condition a student's attendance at commencement exercises on attendance at baccalaureate events.

(c) *Regarding Use of Public-Address Systems for Religious Addresses*. The Defendants, and each of the, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, participating in, or permitting, students, school employees, school officials, clergy, and nonschool persons to pray or to deliver religious or devotional messages (including scriptural readings) over any public-address system during the instructional day (including the home room period) or in connection with any school-sponsored event, including, but not limited to, assemblies and sporting events. This provision includes the delivery of daily announcements. No exception to this provision shall be permitted during times of perceived crisis or exigent circumstances. Where enjoined activity by students occurs, it is CONSIDERED that school officials be and they are hereby ORDERED to take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of such violative conduct as it occurs and to deter similar conduct in the future.

This PERMANENT INJUNCTION DOES NOT prohibit students from making announcements over he school public-address system regarding meetings of noncurricular religious clubs, provided that the announcements themselves do not contain a prayer or devotional, and provided that any such announcements are subject to the same time, place, and manner restrictions that apply to announcements of nonreligious activities.

(d) *Regarding School-Sponsored Assemblies and Events.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise participating in, or permitting, prayers, Biblical and scriptural readings, and other presentations or activities of a religious nature, at all *school-sponsored or school-initiated* assemblies and events (including, but not limited to, sporting evens), regardless of whether the activity takes place during instructional time, regardless of whether attendance is compulsory or noncompulsory, and regardless of whether the speaker/presenter is a student, school official, or nonschool person.

This PERMANENT INJUNCTION DOES NOT prevent secondary-school students from engaging in religious expression and activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. Section 4071 *et seq,* which, while according students expressive rights, does not allow school officials to provide special privileges to noncurricular student religious clubs in terms of meetings and assemblies that they do not provide to other student clubs.

(e) *Regarding Distribution of Bibles and Other Religious Tracts.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise permitting, school officials or nonschool persons to enter any classroom or any school property where students are assembled, for the purpose of distributing Gideon Bibles or other religious tracts, literature, or paraphernalia to students on school property during the school day, including the home room period and any period during which students are required to be present in school, or at any school-sponsored event.

No distribution of Gideon Bibles or other religious tracts, literature, or paraphernalia by placement of them in a common area shall occur in the absence of a formal, written policy adopted by the DeKalb County Board of Education governing distribution of materials from nonschool persons in DeKalb County public schools generally.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED that within thirty (30) days of the date of this PERMANENT INJUNCTION, Defendants shall promulgate a written policy of general application for all DeKalb County public schools, binding upon all school principals, teachers, and other school employees uniformly in each public school in DeKalb County, to govern such distributions in terms of time, place, and manner restrictions; and Defendants shall serve a copy of the same upon Plaintiffs' counsel, who, within ten (10) days, shall list any objections, and shall submit the same to this court for its rejection or concurrence. Following court approval, the Defendants shall publish and shall distribute to each school principal a copy of the written policy, with instructions that it shall be followed in each DeKalb County public school.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to provide *immediately* to the Gideons International representatives who are known by them to have visited DeKalb County schools, or to their designated organizational representative, a copy of this PERMANENT INJUNCTION.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to inform the organization in writing, *immediately*, that students shall not be harassed with regard to acceptance or nonacceptance of any Gideon Bibles that may occur while its representatives are situated on public property near the school, (such as the public sidewalk), *if* students who are approached for distribution are still situated on or boarding school property, and that they shall not throw or pass Gideon Bibles through the windows or doors of DeKalb

County school buses or otherwise act in an aggressive manner toward students with regard to any distribution of Gideon Bibles while those students are still situated on school property (for example, standing in line in the school parking lot to board the bus and still under school officials' general supervision and protection, or boarding the public school bus).

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to send a copy of this written notification to Plaintiffs' counsel and to file a copy with the court.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to follow the exact steps enumerated herein for any nonschool group or person other than the Gideons International that wishes to have access to students for the purpose of distributing Bibles, religious tracts, religious literature, or religious paraphernalia.

In the event of a violation of this PERMANENT INJUNCTION, and in the event of aggressive or harassing behavior of the sort proscribed herein, school officials shall take action to cause the violative conduct to cease immediately.

This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distributions of nonreligious materials.

(f) *Regarding Parties, School Officials, and Potential Witnesses Connected With This Lawsuit.* It is CONSIDERED that the Defendants be and the same are hereby ORDERED to direct school officials to intercede to stop religiously based harassment of the minor child, Jesse Chandler, by other students or by any school official or nonschool person, if and when they observe it on school grounds or are notified of its occurrence on school grounds, including in the lunchroom of Fyffe School. School officials shall take immediate and prudent protective action when notified of any such occurrence or likely occurrence. Nothing in this provision is intended to chill the rights or students to persuade their fellow students on religious matters or to impose on school officials an affirmative duty to prevent conduct of which they have no notice, but rather to impose an obligation to protect a minor child from oppression where it is observed or comes to the attention of school officials.

It is further CONSIDERED that the Defendants, and each of them, be and the same are hereby ORDERED not to retaliate in any way against the Plaintiffs for filing this lawsuit, or to retaliate in any way against those persons identified in affidavits submitted by the Plaintiffs in this lawsuit as persons who support this lawsuit or who oppose school-sponsored religious activity in DeKalb County public schools, and specifically Mrs. Whiteside.

7. AND AS FURTHER AFFIRMATIVE RELIEF, IT IS CONSIDERED AND ORDERED THAT DEFENDANT DEKALB COUNTY BOARD OF EDUCATION SHALL:

(a) Distribute copies of the court's opinions and this PERMANENT INJUNCTION to each school principal within the DeKalb County system immediately, with instructions that each such principal inform faculty, staff, and the students that the court requires compliance;

(b) Post, or make available, in areas commonly utilized for communicating notices or information to both students and faculty (such as the faculty lounge, bulletin boards, etc.) in each DeKalb County public school, a copy of this PERMANENT INJUNCTION, which shall remain so posted until the same expires;

(c) Maintain in the library available for circulation in each DeKalb County public school a copy of "The Riley Letter" in the form in which it appears as Exhibit A to the parties' Joint Motion to Vacate Trial Setting and Voluntary Cessation Agreement and a copy of the monograph entitled "Religion in the Public Schools: A Joint Statement of Current Law," which shall remain available for circulation until this PERMANENT INJUNCTION expires;

(d) Distribute to the Parent Teacher Organization, Parent Teacher Association, Parent Teacher Student Association, or similar group for parental participation in school affairs, at each DeKalb County public school, a copy of this PERMANENT INJUNCTION and a copy of the court's opinions in this matter, with the following statement attached to it:

> The purpose of the court's injunction is to protect the religious rights and freedoms of students in DeKalb County public schools, to prohibit religious activities from being included in official school activities, and to prohibit DeKalb County public schools from sponsoring religious activities. If you believe that any of the rights and prohibitions specified in the injunction are not being observed at your child's

> school, you should contact [the court-approved monitor which/who shall be selected in accordance with the provisions of paragraph (g) below; name, address and telephone number shall be provided with this notice].

(e) Conduct a mandatory in-service training session for faculty and administrators in DeKalb County public schools that is reasonably designed to familiarize these school officials with the provisions of this PERMANENT INJUNCTION, the general contours of Establishment Clause and Free Exercise principles as the court has explained them in its opinions in this case, their rights and duties in connection with the controlling law of church and state relations in the public-school setting, and the general issue of school officials' tolerance for diversity in religious opinion and duty of neutrality in matters of religion when acting in their official capacities. This in-service training shall be conducted during time regularly set aside for such purposes but shall occur during the 1997-98 school year. The Defendants shall not be obligated to conduct an in-service session for new faculty and administrators each year who were not present for the 1997-98 in-service training, but shall be required to direct all such new faculty and administrators to read and to acknowledge in writing that they have read the curricular/teaching materials used at the 1997-98 in-service session, a copy of which shall be maintained by the DeKalb County Board of Education for this purpose.

The curricular materials used for this purpose shall be the court's opinions in this matter, this PERMANENT INJUNCTION, and in addition, one of the following: (a) the Anti-Defamation League's "A World of Difference" program; or (b) a similar program of religiously neutral, nonsectarian content selected by the DeKalb County School Board and submitted to the court-appointed monitor referenced in paragraph (g), below, for his, her, or its approval, with a copy served on Plaintiffs' counsel for the purpose of tendering specific written objections within ten (10) days of service. If a nomination is not made by the Defendants within forty-five (45) days of the date of this PERMANENT INJUNCTION, the court will select the curricular materials, with due regard for the recommendation of the court-appointed monitor.

The DeKalb County Board of Education shall pay the costs of the in-service curricular materials, and;

(f) Cause its counsel to certify to the court, each September 30, December 31, March 31, and June 15, for each school year until further order of the court, that each school within the DeKalb County school system is in compliance with this PERMANENT INJUNCTION, and to send a copy to the person or entity referenced in paragraph (g) below, the State Department of Education, and to Plaintiffs' counsel; and

(g) Within thirty (30) days of the issuance of this PERMANENT INJUNCTION, nominate and submit in writing, *in conjunction with counsel for the Plaintiffs*, three (3) neutral entities or persons, with a description of qualifications, to serve as a monitor for the purpose of insuring compliance with this PERMANENT INJUNCTION. The Parties shall *jointly* arrive at the list of three (3) neutral entities or persons nominated to serve as monitor. The court will appoint one of these three nominees to serve as its monitor. Failing the nomination of a neutral entity or person within thirty (30) days of the issuance of this PERMANENT INJUNCTION, or absent a nominee acceptable to the court, the court will appoint a monitor of its own choosing. The monitor shall have the power and authority to:

(i) enter any classroom or public school property, school assembly, sporting event, commencement exercise, or school-sponsored or school-initiated event for the purpose of observing and reporting on compliance for the duration of this PERMANENT INJUNCTION; and

(ii) collect complaints regarding any violation of any provision of this PERMANENT INJUNCTION for the purpose of investigating violations and if warranted, reporting them immediately to the court; and

(iii) verify that there are no violations of the provisions of this PERMANENT INJUNCTION during each of the periods referenced in paragraph (f) above, and tender verification to the court within 10 days of the passage of the dates specified in paragraph (f) above; and

(iv) engage in *ex parte* communications with the parties and any persons or entities: (1) in the course of conducting investigations based on complaints; (2) in verifying compliance with this PERMANENT INJUNCTION; and (3) in furtherance of his, her or its responsibilities under this PERMANENT INJUNCTION; and

(v) engage in *ex parte* communications with the court.

The monitor shall be paid, by the DeKalb County Board of Education, a reasonable fee for services and expenses as shall be independently reviewed and approved by the court upon petition for fees within ten (10) days following the dates specified in paragraph (f) above in connection with monitoring compliance with the provisions of this PERMANENT INJUNCTION.

8. The court shall retain jurisdiction of this matter until further order of the court, with power to enforce the provisions of this PERMANENT INJUNCTION by all means, writs, and remedies available to it, including, but not limited to, the exercise of its powers of contempt for violation of the terms hereof.

The United States Marshal is hereby DIRECTED to personally serve a copy of this PERMANENT INJUNCTION, together with the FINAL JUDGMENT AND ORDER and MEMORANDUM OPINION, upon Defendants: the Honorable Forrest W. ("Fob") James, Jr., Governor of the State of Alabama; the Honorable William H. Pryor, Attorney General of the State of Alabama; the Honorable William Gray, Legal Adviser to the Governor; the Honorable Ed Richardson, Superintendent of Education for the State of Alabama; and the Honorable Richard Land, Superintendent of the DeKalb County Board of Education.

All costs herein incurred shall be and the same are hereby assessed against the DeKalb County Board of Education, for which let execution issue.

DONE this the 29th day of October, 1997.

/s/ Ira DeMent
UNITED STATES
DISTRICT JUDGE